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RECORD, CASE No 13,851.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 241.

THE MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

OLE NELSON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED OCTOBER 21, 1889.

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1 STATE OF MINNESOTA, } ss:
County of Freeborn, }

District Court, Tenth Judicial District.

OLE NELSON, Plaintiff,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Defendant. } Summons.

The State of Minnesota to the above-named defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in -he above-entitled action, a copy of which is herewith served upon you, and to serve a copy of your answer to said complaint on the subscribers at their office, in Albert Lea, in the county of Freeborn and State aforesaid, within twenty days after the service of this summons upon you, exclusive of the day of such service, and if you fail to answer the said complaint within the time aforesaid the plaintiff in this action will have the amount he is entitled to receive ascertained by the court or under its direction and take judgment for the amount so ascertained and for costs.

LOVELY, MORGAN & MORGAN,
Plaintiff's Attorneys, Albert Lea, Minn.

Dated October 19th, 1885.

2 STATE OF MINNESOTA, } ss:
County of Freeborn, }

I hereby certify and return that I did, on the 19th day of October, A. D. 1885, personally serve the within summons and the annexed complaint upon the within-named defendant, The Minneapolis & St. Louis Railway Company, at the city of Albert Lea, in said county and State, by then and there handing to and leaving in the possession of W. H. Truesdale, the general agent of said defendant at said city, a true and correct copy thereof.

Dated October 19th, A. D. 1885.

JACOB LARSON,
Sheriff of Freeborn Co., Minn.,
By T. L. TORGERSON,
Deputy Sheriff.

Fees.

Service	$1 00
Copy	1 00
Mileage	20
Total	$2 20

3 STATE OF MINNESOTA, } ss:
County of Freeborn, }

District Court, Tenth Judicial District.

OLE NELSON, Respondent,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Appellant.

Know all men by these presents that the Minneapolis & St. Louis Railway Company, as principal, and W. H. Truesdale and Charles F. Hatch, as sureties, are held and firmly bound unto Ole Nelson in the sum of two hundred and fifty dollars, lawful money of the United States, to be paid unto the said Ole Nelson, his heirs, executors, administrators, or assigns, for which payment, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 20th day of September, A. D. 1888.

The condition of this obligation is such that whereas the said Minneapolis & St. Louis Railway Company has appealed to the supreme court of the State of Minnesota from an order of the district court aforesaid denying defendant's motion for a new trial of said action, and which order was filed in the office of the clerk of said court and bears date on the 3rd day of September, 1888:

Now, therefore, if said appellant shall pay all costs and charges which may be awarded against it on said appeal, not exceeding the penalty of this bond, then this obligation shall be void;

4 otherwise to remain in force.

In testimony whereof we have hereunto set our hands and seals this twentieth day of September, A. D. 1888.

THE MINNEAPOLIS AND ST. LOUIS RAILWAY CO.,
By W. H. TRUESDALE, *Pres.*
W. H. TRUESDALE. [SEAL.]
CHAS. F. HATCH. [SEAL.]

Signed, sealed, and delivered in presence of—

A. J. MAYNARD.
HOWARD S. ABBOTT.

5 STATE OF MINNESOTA, } ss:
County of Hennepin, }

Be it known that on this 20th day of September, A. D. 1888, before me personally came W. H. Truesdale, the Minneapolis & St. Louis Railway Co., by W. H. Truesdale, president, and Charles F. Hatch, to me well known to be the same persons who executed the foregoing bond, and each severally acknowledged the same to be his own free act and deed.

[SEAL.] HOWARD S. ABBOTT,
Notary Public, Hennepin Co., Minn.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

W. H. Truesdale and Charles F. Hatch, being duly sworn, say each for himself that he is one of the sureties above named; that he is a resident and freeholder of the State of Minnesota and worth double the amount of two hundred & fifty dollars specified in the foregoing bond above his debts and liabilities and exclusive of his property exempt from execution.

W. H. TRUESDALE.
CHAS. F. HATCH.

Subscribed and sworn to before me this 20th day of September, A. D. 1888.

[SEAL.] HOWARD ABBOTT,
Notary Public, Hennepin Co., Minn.

Due ssrvice accepted Oct. 1, 1888, at A. Lea, Minn.
LOVELY & MORGAN,
Pl'ff's Att'ys.

Filed Oct. 1, 1888.
GEO. T. GARDNEE,
Cl'k Dist. Court.

6 The summons in this action was served October 19th, 1885.

OLE NELSON, Plaintiff,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Defendant.

Complaint.

State of Minnesota, County of Freeborn, District Court, Tenth Judicial District.

7 Now comes the above-named plaintiff, by Lovely, Morgan & Morgan, his attorneys, and complains in civil action against the above-named defendant, and for cause thereof alleges:

First. That at all the times hereinafter stated said defendant was and still is a railroad corporation duly incorporated, created, organized, and existing under the laws of this State, and as such corporation at all of said times was in the possession of and operating a railroad in this State under the corporate name of the Minneapolis & St. Louis Railway Company.

Second. That ever since long prior to the 1st day of November, A. D. 1879, said plaintiff has been and now is the owner in fee and in possession of the following-described land and premises, situated in the county of Freeborn and State of Minnesota, to wit: The northeast quarter of the northwest quarter, and the southeast quarter of the northwest quarter, and the southwest quarter of the northeast

quarter, and the northeast quarter of the southwest quarter, and the northwest quarter of the southeast quarter of section twelve (12), township one hundred and one (101), range twenty-two (22) west.

Third. That, except as hereinafter stated, said land was then, and ever since has been, owned and occupied by said plaintiff as a farm and homestead for himself and family, and at all of said times has been kept and maintained by said plaintiff under cultivation for farming purposes, and was properly enclosed by a lawful fence; and plaintiff further alleges that said farm was useful and valuable for the purpose of raising stock, and that at, prior to, and ever since said time he was and has been the owner of a large num-
8 ber of horses, cattle, and other live stock, which he raised and cared for upon his said farm.

Fourth. That on or about said last-named day said defendant built and constructed its line of road over and across the land of this plaintiff above described and laid and built its track thereon, and has continued to use and occupy a strip of said land about fifty feet in width on either side of said track across the plaintiff's said farm for railroad purposes, over and across which it has continued daily to run its engines, locomotives, and trains of cars in the operation of its said road.

Fifth. That ever since said last-named day and long prior thereto, at the places where said railroad enters and leaves said farm, a public highway existed and now exists on the south and east sides thereof, which said highway was and ever since has been and now is crossed by said railroad.

Sixth. That said defendant has wholly failed, neglected, and omitted to erect on the sides of its said road where the same crosses the land of this plaintiff above described such fences as by law it was required and bound to build, or any fences, either good and substantial or otherwise, on each or either side of said railroad and between the land so occupied by it for right of way and the premises and farm of said plaintiff, and that said defendant has not built or maintained any cattle-guards where said railroad enters and leaves said land at the said public highway and crossings, but that the said highway and crossings and said
9 plaintiff's farm have been left open during all of said time, and in said respects said defendant has run and operated its said road contrary to the laws of this State over and across said land by neglecting to fence the sides of said railroad and to build said cattle-guards at said crossings, to the imminent danger and peril of said plaintiff's stock and cattle, to his great injury and annoyance during all of said time, whereby said plaintiff has been compelled to spend a great deal of time and money in watching and keeping his said stock and cattle so watched and tended as to prevent them from escaping onto said track and road and being there killed and injured by the trains of cars and locomotive engines of said defendant, and said plaintiff has thereby been deprived of the free and beneficial use, enjoyment, and occupation of said farm and premises by reason of the defendant's unlawful use of that portion of its railroad which crosses the same as aforesaid; which said un-

lawful use by the defendant has greatly diminished the value of its use and occupation by said plaintiff and has totally destroyed its value for the purposes of stock-raising thereon and has greatly hindered and delayed said plaintiff in carrying on his said farm, to his damage in the sum of $2,000.00.

Wherefore plaintiff demands judgment against said defendant for the sum of $2,000.00 and for costs.

Dated October 19th, A. D. 1885.

LOVELY, MORGAN & MORGAN,
Attorneys for Plaintiff, Albert Lea, Minn.

10 Title as in complaint.

Answer.

Answering the complaint of the plaintiff in the above-entitled cause, the defendant denies each and every allegation therein contained, except it admits that at the times stated in said complaint it was and is a corporation for railway purposes duly created by and existing under the laws of the State of Minnesota and vested with the rights, properties, and franchise of the Minnesota Western Railroad Company, that certain railway corporation created by and formed under that certain special act of the legislature of the Territory of Minnesota entitled An act to incorporate the Minnesota Western Railroad Company, approved March 3rd, 1853, and the several acts amendatory thereof.

Wherefore defendant demands judgment against plaintiff for costs and disbursements.

J. D. SPRINGER,
Attorney for Defendant, Minneapolis, Minn.

Settled Case.

This action is brought before the Honorable John Q. Farmer, judge of said court, and a jury at a regular term thereof held at Albert Lea, in said county, on the 17th day of May, 1888; Messrs. Lovely & Morgan and D. F. Morgan appeared for the
11 plaintiff, and F. D. Larabee and B. S. Lewis for the defendant, and the following procedure was had on such trial:

The defendant first objected to any evidence being given under the complaint for the reason that the same does not state facts sufficient to constitute a cause of action, and also for the further reason that the liability sought to be imposed upon the defendant by virtue of the railway-fencing statutes of the State of Minnesota impairs the obligation of the contract embodied in defendant's charter and is in violation of article one (1), section ten (10), of the Constitution of the United States, and is also in violation *to* the fourteenth amendment to the Constitution of the United States.

OLE NELSON, the plaintiff, was then sworn on his own behalf and testified as follows:

Examination-in-chief by Mr. LOVELY:

"I reside in the township of Nunda, Freeborn county, and have for about 27 years, and have lived upon the land described in the complaint for 24 years."

It is here admitted by the defendant that the plaintiff, Ole Nelson, is the owner in fee of the land described in the complaint and was such owner at all times alleged therein.

It is admitted by the plaintiff that the defendant was the owner in fee by deed from the plaintiff of a strip one hundred feet
12 wide across said land, and upon which its railroad is constructed, at the time of such construction and has remained such owner ever since.

(The witness then continued:) "The railroad was built eight or nine years ago over this land, on section twelve."

Q. (Plat shown witness.) That is your land on section 12?

A. Yes, sir.

At the time I was the owner of a square quarter section and 40 acres besides adjoining the quarter section. The quarter section alone was fenced.

Q. This mark is a mark that represents the railroad track?

A. Yes, sir.

Q. This road running north and south is the highway?

A. Yes.

Q. And this one running east and west is the highway?

A. Yes, sir.

Q. And there is another one on the west side?

A. Yes, sir.

There are public highways running along the east, south, and west sides of the quarter section. My house is on a small village lot adjoining the southwest forty, near to the southwest corner, and is fenced in with the quarter section and is all a part of the same farm.

Q. Whereabouts on the land is your house?

A. (Witness points out same on plat.)

Q. On what forty?

A. In a lot in the city.

13 Q. Is it on a forty?

A. No; I have lots in the village of Twin Lakes City.

Q. Is it all enclosed?

A. Yes, sir; all enclosed together.

Q. It is on your forty?

A. Connected with it.

Q. Connected with it?

A. Yes, sir; it joins my quarter section.

Q. It is not a large lot?

A. No, sir; it is not a large lot. It is a very small lot.

Q. Whereabouts does it join the quarter?
A. On the south side.
Q. On the quarter line?
A. Yes, sir.
Q. How far from the southwest corner?
A. It must be east about 40 roads. It is just a little jag.
Q. That is all a part of the same farm?
A. Yes, sir.
Q. All the same farm?
A. Yes, sir; I got a house on the quarter section myself, but I don't live in it myself. I rent that house to some one else.

There is another house on the quarter section, but I don't live in it. I rent that house, and this was so when the railroad was built and ever since. The farm was used for raising crops the same as other farms, and I cultivated between 80 and 90 acres and cropped it in corn, wheat, oats, barley, and potatoes. I had a pasture
14 for my cattle when the railroad went through and they opened it so I could not use it any more. I think there was 30 or 40 acres enclosed as the pasture. The pasture was near the southeast corner of the farm. There was a small field of about six acres east of the pasture that was plowed land. The pasture was enclosed by itself and all the rest of the quarter section was enclosed in one field. The railroad ran diagonally through the southeast forty. It was about 70 rods long from where it entered my land to where it left. It went partially through a plowed field and then through the pasture. It cut off about 15 or 16 acres in the southeast corner and the rest of my land all lay on the west side of the railroad track.

The railroad company from the time of its being constructed up to the time of the commencement of this action did not build any fences on either side of its road through my land nor any cattle-guards between my land and the highway where they entered and left my land, and it was left all open. I used my farm all that time for farming purposes and for keeping cattle and horses on it.

Q. How many cattle did you have on that farm at the time the railroad was built and since until the commencement of this action?

Objected to by defendant as immaterial, incompetent, and irrelevant, and also for the reason that the liability sought to be imposed upon the defendant by virtue of the railroad-fencing statutes of the State of Minnesota impairs the obligation of the contract embodied in defendant's charter and is in violation of article one, section ten, of the constitution of the United States, and because it is in
15 violation of the fourteenth amendment to the constitution of the United States.

Objection overruled, and defendant excepted.

A. I generally kept from 25 to 60 head of cattle and from 6 to 12 head of horses and kept about 60 head of cattle and have kept the same number ever since, sometimes more and sometimes less, but about that number.

Q. At the time the railroad company built its road across your farm the way it did how did its neglect to build that fence and the

cattle-guards interfere with your free use and occupation of that farm?

Objected to by defendant upon the grounds mentioned in the last objection.

Objection overruled, and defendant excepted.

A. Well, I had to keep a man to herd my cattle all the time.

Q. Why?

Objected to by defendant upon all the grounds stated in the last objection.

Objection overruled, and defendant excepted.

A. Well, it is the danger of their getting killed all the time—danger of cattle getting on the track; they get killed. I had to keep a man with them all the time, herding them.

Q. Where did you keep your cattle?

A. I must keep them on my place, and then I rented more land all the time. Sometimes I rented of Mr. Morin and sometimes of Mr. Wilson a quarter section.

Q. Kept them on your own place?

16 A. Sometimes on my place and sometimes on the other place.

Q. I understood you to say that this piece of pasture that you had was right here (indicating on map).

A. That is where I had that pasture. (Witness marks said pasture on the diagram.)

Q. Were you in the habit of allowing your stock, during any season of the year, to run on your land?

A. They ran all the time on it. I let them run all the time on that farm.

Defendant objected to any evidence of cattle being kept on some other farm.

By the COURT: Confine yourself to this place—to the piece of land in question.

The witness then continued: I let my stock run all of the time on that farm. I had so many cattle that I had to let them run to get them a living. My barn is on the southwest forty, near the house. It was a straw stable for keeping horses. My fields were on the north side of the track and on the west and a little on the east side. There was meadow all up through on the west side of the quarter section. I never raised much corn on my cultivated land, only between 25 and 30 acres of corn.

Q. How did you let your cattle run up to the time the railroad was built across there and until the beginning of the action?

Objected to by defendant as immaterial, incompetent, and irrelevant and because the liability sought to be imposed on the defendant by virtue of the railway-fencing statutes of the State of

17 Minnesota impairs the obligation of the contract embodied in defendant's charter and is in violation of article one, section ten, of the Constitution of the United States, and is also in

violation of the fourteenth amendment to the Constitution of the United States.

Objection overruled. Defendant excepted.

A. By herding them most through the whole farm. I kept a boy with them all the time, pretty near.

Q. Why did you do that?

Objected to by defendant upon all the grounds stated in the last objection. Objection overruled, and defendant excepted.

A. On account of danger that they go there and get killed. On account of their going on the railroad track and getting killed—that is the reason why I had a man to take care of them, so they wouldn't get into the neighbors' fields.

Defendant moves to strike out the last part of the witness' answer as immaterial and incompetent.

Motion denied, and defendant excepted.

Q. I will ask you whether or not the reason they would get into the neighbors' fields was by reason of the negligence of the railroad company in not building cattle-guards and a fence along the track.

Objected to by defendant as immaterial, incompetent, and irrelevant and for the reason that the liability sought to be imposed upon the defendant by virtue of the railroad-fencing statutes of the State of Minnesota impairs the obligation of the contract embodied in defendant's charter and is in violation of article one, section
18 ten, of the Constitution of the United States, and because it is in violation of the fourteenth amendment to the Constitution of the United States.

Objection overruled, and defendant excepted.

A. Yes, sir.

The witness then continued: My fences were kept up all the while until the railroad was built, and it was fenced at the time the railroad came.

Q. It was owing to the liability of the cattle to get out and go over these tracks?

A. Yes, sir; to get out over the tracks. It is part of the east part of my farm. I didn't fence on account of the railroad track (pointing out on plat).

Q. How much of the time was this herding done each year after the railroad was built up to the commencement of this action?

Objected to by defendant on all the grounds stated in the last objection.

Objection overruled, and defendant excepted.

A. Well, I had to herd them winter and summer both times.

The witness then continued: There was two of my sons herding off and on—only one at a time. I had to keep watch of them all the time, so that they wouldn't get onto the track.

Q. And you herded all the time?

A. Yes, sir. I had to keep watch of them all the time, so that they shouldn't get on the track. We couldn't let them out at all, or they would get on the track.

19 I am a farmer and have been for 24 years on this same farm and have raised stock and cultivated it during that time, and I have had charge of the farm.

Q. I will now ask you this question; if you know what the difference is you can answer by yes or no: If you know what the difference between the rental value of that farm was between the 1st day of November, 1879, and the 19th day of October, 1885, by reason of the neglect of the defendant railroad company to build fences on each side of its track and cattle-guards at the road crossing where it entered and left your farm?

Objected to by defendant upon all the grounds stated in the last objection.

Objection overruled. Defendant excepted.

A. I do.

Q. Do I understand you to say that where the railroad entered your farm was a highway crossing?

A. Yes, sir.

Q. And where the railroad left?

A. Yes, sir.

Q. And there were no cattle-guards at either end?

A. No, sir.

Q. I will ask you what was the difference in the value per year caused by the neglect of the railroad company to put cattle-guards in between these times.

Objected to by defendant upon all the grounds stated in the last objection.

Objection overruled, and defendant excepted.

Q. The question is in dollars and cents as you estimate it. What was the difference per year?

20 A. Well, I should judge it about $400 a year difference.

Q. How do you make that up?

A. On account of the herding and the bother all the time, winter and summer.

Q. Did it bother you personally?

A. I got to keep watch at home all the time so the children would keep care of them.

Q. Did you have to attend to the matter yourself?

A. Yes, sir.

Q. Can you describe more particularly than you have done the care that you were compelled to use and exercise yourself?

A. I had to keep it in mind all the time.

Q. You had to keep it in mind?

A. Yes, sir; the cattle were on the track more or less all the time; when I heard a whistle I got to run; myself and children, too.

Defendant then moved to strike out the evidence of the witness as to herding, and as to the witness having to keep it in mind all the time as immaterial, incompetent, and irrelevant.

Motion denied, and defendant excepted.

The witness then continued: They generally run about four trains over the track per day, two freight and two passenger trains, and a good many extra trains besides, off and on.

Q. Did you have to take up your stock nights?

Objected to by defendant as immaterial, incompetent, and irrelevant, and because the liability sought to be imposed impairs
21 the obligation of the contract embraced in defendant's charter and is in violation of those portions of the Constitution of the United States before referred to.

Objection overruled, and defendant excepted.

A. Of course we have.

Q. Did you let your horses run?

Objected to by defendant upon all the grounds stated in the last objection.

Objection overruled, and defendant excepted.

A. No; I had to take them up because they took my pasture away from me.

The witness then continued: Up to that time I had been using my pasture for pasturing horses, except once in awhile I had a few head of cattle in that, but not to amount to anytning. I generally kept the pasture for horses, and was compelled to shut them up; I had six or seven head at that time. My farm was useful for that purpose.

Cross-examination by Mr. LEWIS:

Witness testified: I had 30 acres of pasture in the southeast part of my farm and east of the house, and just east of the pasture there was a little piece that was improved land. The 30 acres of pasture was fenced in. North and west of the pasture was used for farming purposes, and there was no pasture there at the time the railroad was built through. There was about 80 acres under cultivation, and the balance of the farm was meadow and timber. The meadow and timber was fenced in with the farming land.

About a year and a half before this action was commenced
22 I fenced in that north forty as a pasture for my horses. Before that and after the railroad was built I kept them in my barn most of the time; they were work-horses, and I was using them as such. Since then I have had 10 or 12 horses each year, mostly work-horses and colts. I kept the work-horses in the barn and let the colts run generally in the pasture, which I had fenced in on a piece of rented land.

At the time the railroad was built, in 1879, I had something over 50 head of cattle. I kept them on that rented farm and herded

them. I was then keeping perhaps 40 head in that way; my pasture of 30 acres was not large enough for them all. I don't recollect how many cattle and horses I had each year from 1879 up to the time of the bringing of the action. I always kept lots of young stock, but had each year from 40 to 50 head. I kept them on the farm after I got the crop off, and in the summer I kept them on the rented place and herded them. The land that I rented lay on the south side of my land; it was not fenced at all. I kept my sons watching the cattle all the winter time, and when any cattle got on the track they went down and drove them off whenever we saw them from the house. The $400 I was damaged per year included the cost of herding in the summer time as well as in the winter, but did not include the cost of herding on the rented farm and I did not include that in my estimate. This was for my trouble after the railroad was built; it is more than any man knows that don't live across the railroad. If a man lives across the railroad he will soon find out.

Q. You had more cattle than you could keep on this
23 farm?

A. Yes, sir; I always had. I had more cattle than it would keep on this 200 acres.

Q. How do you make up this $400? Separate each item, or rather into items; how much of it was for herding?

A. Well, I call it all for herding and bother we have been to also.

Q. The herding was in driving the cattle backwards and forwards from where they were kept to your land, was it not?

A. They drive them on the main travelled road in the morning, and then after we get the crop out from my farm then we put the cattle on.

Q. In the summer time; how was it at that time?

A. We had to drive them then.

Q. State whether it was a bother to drive them to and from where you herded them in the summer time and to your house nights and away from the house in the mornings.

A. It was driving the cattle in the morning; the herding ground was right beside the farm and beside the railroad track.

Q. The bother was in the summer time?

A. I think it was a big bother.

Q. The bother was that you had to keep a man with the cattle to keep them from the railroad track?

A. There was no cattle-guards and no fences.

Q. On this land where you were herding them there were no fences?

A. No, sir; to get to this land where we were herding
24 them they went down the main travelled road and got on the south side of the farm. The herding ground is right on the south side of my farm, where I kept my cattle. They drove the cattle on this herding ground where they herded them, and in the room of going along the main travelled road they went up the railroad track; they always wanted to go immediately up the railroad track,

and just as soon as they would get into the crops and as quick as they could get off they went into the fields.

Q. And right up next to the railroad track was the herding ground?

A. It was close to the railroad. I think the railroad runs a little through the herding grounds.

Q. Part of this was to keep the cattle off the railroad there?

A. Yes, sir.

Q. Part of the labor was to keep these cattle off this unfenced place south of your farm, on the herding grounds?

A. Yes, sir.

Q. And in driving them from the herding ground and in driving them to the herding grounds in the morning along the highway?

A. Yes, sir; driving them along the highway in the morning.

Q. What was it?

A. Yes, sir; of course, the railroad goes through my herding grounds there.

The witness then continued: I know what the rental value of my farm would have been per year if that 70 rods of railroad
25 had been fenced. It would have been seven or eight hundred dollars a year. I could raise just as much corn on this farm after the railroad was built as I could before. After the railroad was built, I think the next summer, I fenced along the railroad track where it went through my pasture. I wanted a smaller pasture just for keeping three or four head of horses in. This was on the west side of the railroad, from the north to the south pasture fence.

Q. You don't understand me (showing diagram to witness). You said there was a pasture there?

A. Yes, sir.

The rest of the pasture which lay east of the railroad was about 11 acres. I mowed it after the railroad was built every year. I herded on it in the spring and then kept the cattle off and cut the grass.

Q. After you had fixed the fence and while you were using that as a meadow what was the rental value of that farm per year up to 1885?

A. Do you mean the whole farm?

Q. Yes; the whole farm, just as it was, without any fence or cattle-guards, if you should rent it out.

A. I wouldn't rent it, anyway, for less than $800 per year.

Q. As it was?

A. The way the farm is located, without any fence on it, is a nuisance.

Cross-examination by Mr. LARABEE:

Q. I will ask you what, in your opinion, the rental value
26 of your place, the fair rental value of the whole place, was during the first year after the railroad was constructed over your farm—that is, before you had changed your pasture fence;

what was the fair rental value of your whole place during the first year with no fence or cattle-guards having been built by the railroad company?

A. I should think it was about two dollars an acre—that is, $400 a year.

Q. Would you have rented your farm for that during that period?

A. I believe I would; maybe I would.

Q. What would have been the fair rental value of your whole farm during that period if the railroad company, when the railroad was built through there, had built proper fences and constructed proper cattle-guards at the highway?

A. I should not like to rent it for less than between eight and nine hundred dollars.

The witness then continued: After a year had elapsed I changed the pasture fence on the west side of the track. This made the pasture smaller, and it was too small, and I only kept it that way one year, and I made a pasture on the north forty away from the track. My whole farm is meadow, and I would call it good grass land. I always herd my cattle on it.

Q. After the expiration of the first year and until you brought this action what was the fair rental value of the whole place as it was, after the first year, just as it was?

A. I should think about $400 a year.

Q. What would it have been worth during that same period
27 if a fence had been constructed and cattle-guards built as the statute requires?

A. I think it would have been worth $800 a year.

Q. You have said that the difference of $400 a year was caused by the herding entirely?

A. Yes, sir.

Q. What portion of the year did you herd your cattle on your own land?

A. I generally got a crop off in the month of August and always commenced mowing in July, and then after the grass became nice I turned them in.

Q. How much of each year did you herd your stock on your own land?

A. Seven or eight months—from August up to seeding time, in April.

The witness then continued: I only kept my cattle on the leased land between four and five months. I kept them there as little as I could; it was too much bother to keep them on that land. When they were on the leased land I drove them home every night, and in driving them back to the herding ground in the morning I drove them upon the public highway and had a good deal of trouble in driving them to the leased land on the highway to keep them off the railroad track on account of there being no cattle-guards; but the cattle, in driving them along the highway, when they came to the railroad track would try to get on it because there was no cattle-guards, and a part of the $400 that I claim as damages is in keeping them off from the railroad track at these times. The $400

included the expense of driving them to the leased land, to
28 and fro. The trouble and expense of keeping the cattle off from the track while they were being herded on the leased land is not a part of this $400. I never thought to get anything for that. If I herded them on rented land I had that bother for nothing.

I had to lease this land anyway, whether the road was constructed across my land or not, because I had too many cattle for my land. It required a man to herd these cattle on the leased land. It would not have been necessary for me to have herded my cattle on my own land if the railroad had not come there.

It only required one of my sons, a boy from ten to fifteen years old, to herd the cattle. The services of a boy of that age during that time was about $12 a month. A man's wages would have been $25 a month without board. I generally let my cattle run during the winter; I let them run during the winter to the straw stacks and do not calculate to put them in the stable during the winter; I let them run to the straw stacks. During the winter season I have had trouble with cattle going through the fields and across the railroad track. It seems as natural for cattle to go on the railroad track as anything in the world.

Redirect examination by Mr. LOVELY:

The witness testified: Before the railroad track was built I leased land and pastured cattle and herded them during the summer time. I did not estimate anything for the damage I sustained from the pasturing of my cattle in the summer.

29 Q. You say you made these changes in the fences in your pasture; have you made some changes since?

A. Yes, sir.

Q. Why did you do that?

Objected to by defendant as immaterial, incompetent, and irrelevant.

Objection overruled, and defendant excepted.

A. On account of having pasture for my horses; otherwise I had to take them off half a mile north from the house, on the farm on the north forty.

LEWIS MARPE was then sworn on the part of the plaintiff and testified as follows:

I am one of the county commissioners of Freeborn county and live in the town of Nunda and know the defendant. I remember when the railroad was built across the land and I am acquainted with plaintiff's farm, which has been described here. It was inclosed with a fence when the railroad was built. I live four miles west from this farm and a little south, and I pass there when I come to Albert Lea.

Q. Do you know what Mr. Nelson used this farm for?

A. To farm it.

Q. What for?

Objected to by defendant as immaterial, incompetent, and irrelevant, and also because the liability sought to be imposed impairs the obligation of the contract embraced in defendant's charter and is in violation of those portions of the Constitution of the
30 United States before referred to.

Objection overruled, and defendant excepted.

A. I have seen him pasture some cattle on it and know of his herding cattle there. He has been herding cattle there a little of late years since the railroad came. I am a farmer and have been all my lifetime; have been carrying on a farm near plaintiff's farm and a little west. Same kind of a farm, only a little larger.

Q. I will ask you if you know what the fair rental value of that farm was, with the railroad crossing it as it did and with fences built and cattle-guards put in there and without fences and without cattle-guards where it entered and left the farm, between the 1st of November, 1879, and the 19th day of October, 1885.

Objected to by defendant upon all the grounds stated in the last objection.

Objection overruled, and defendant excepted.

A. What the land would be worth at that time and what it would be worth after the railroad was built?

Q. Without being fenced.

A. I wouldn't give within $700 for the place of what I would if the railroad was not there. If I was going to buy the place, I wouldn't give within $700.

Q. That is not the question; it is the use or rental value of the place each year.

A. That is about the same thing, to my notion, the way I understand it. You take it as a rent and you get one-third for your land by having the land fenced and by that way you figure it at whatever the grain you sow gives.

31 Q. That farm could have been used for one purpose or it could have been used for other purposes?

A. Yes, sir.

Q. What difference would that make, if you know, to the rental value of the farm per year? What would it have been worth or what would its fair rental value have been, considering what it was used for and what it was capable of producing? Not what it would sell for, but the fair rental value; what it would rent for?

Objected to by defendant upon all the grounds stated in the last objection.

Objection overruled. Defendant excepted.

A. I should say it would make a good deal of difference.

Q. Per year, what would the difference be, if you know?

Objected to by defendant upon all the grounds stated in the last objection.

Objection overruled, and defendant excepted.

A. He couldn't turn his cattle out after harvest.

Q. What, in your opinion, would that effect upon it be in dollars and cents?

A. I wouldn't lay it at less than $300 damage to that place.

Cross-examination:

Q. Do you know of any farms having been rented in this section of the country?

A. Yes, sir; they are always rented on shares, though.

32 Q. If the railroad had been properly fenced he could have rented it for one-third of the crop?

A. Yes, sir; he could rent it a little better than that; he could rent it for one-half easier than this way for one-third.

Q. When you rent it for one-half who furnishes the seed?

A. The man who owns the land furnishes the seed.

Q. And then the other way, where the man who owns the land does not furnish the seed, what rent do you get?

A. They generally get one-third and deliver the grain in the granary.

Q. What portion of the crop would he get if the railroad was not fenced?

A. That is according to circumstances. If a man owns stock he has to take care of them.

Q. We are talking of how much rent he would get; how much it would rent for. One man might have stock on it and another man might not. How much would it rent for with the railroad unfenced? How much share would a man be willing to give for it, the man furnishing everything?

A. I don't know; I couldn't tell you. I don't know what such a farm would rent for in that shape.

Q. What is your best judgment?

A. I don't know.

Q. What is your best judgment if it was not fenced, as it was not?

A. I couldn't tell you that; there is but very few places rented there anyway.

33 Q. How much, in your judgment? Would he get a quarter?

A. Yes; he would get a quarter.

Q. About how much total produce and pasture could be raised on that farm if it was all properly fenced?

A. There could be a good deal raised if it was properly fenced.

Q. How much in all?

A. Well, he takes the wheat off and then he has the pasturage afterwards.

Q. How much?

A. There is a good deal in there all over.

Q. How much would the money rent be? Can you say?

A. If it was fenced it would be four dollars an acre.

P. HONAN was then sworn on the part of the plaintiff and testified as follows:

I live in the town of Nunda and am acquainted with the plaintiff. My occupation is farming, and has been for 25 years. I live two and a half miles from the plaintiff and am acquainted with his farm and know where the railroad passes through it. It is farmed some in hay and some in grain. The farm was fenced, but the railroad track was not fenced nor cattle-guards put in at the highways. I know that Mr. Nelson farmed and stocked it and know how it was done.

34 Q. I will ask you, if you know, if you have any knowledge or opinion as to the fair rental value of that farm, what it would be worth with the railroad crossing it as it does, unfenced and without cattle-guards, and with fences and cattle-guards properly built as they should be.

Objected to by defendant as immaterial, incompetent, and irrelevant, and also because the liability sought to be imposed impairs the obligation of the contract embraced in defendant's charter, and is in violation of those portions of the Constitution of the United States referred to.

Objection overruled, and defendant excepted.

A. Two hundred dollars a year.

JAMES MCGUIRE was then sworn on the part of the plaintiff and testified as follows:

I reside in the town of Freeman, about three-quarters of a mile from Mr. Nelson's land. I remember when the railroad was built across there in 1879, and am acquainted with the farm as it was at that time and has been since. My occupation has been farming, carrying on the same kind of a farm as Mr. Nelson has. I don't know exactly how Mr. Nelson carried on his farm; every man runs his own according to his own idea. I know how his farm lay—how much of it was pasture, how much wheat land, etc. I have been on it frequently.

Q. I will ask you if you know or if you have any opinion as to the difference in the fair rental value of that farm per year
35 with the railroad track lawfully fenced and the cattle-guards put in where it entered and left the farm and the rental value of the farm as it was between the 1st day of November, 1879, and the 19th day of October, 1885.

Objected to by defendant as immaterial, incompetent, and irrelevant, and because the liability sought to be imposed impairs the obligation of the contract embodied in defendant's charter, and is in violation of those portions of the Constitution of the United States before referred to.

Objection overruled, and defendant excepted.

A. I think I should put it at $300 a year.

Cross-examination:

The witness testified; I mean $300 a year, because the railroad runs across it. It is worth $300 a year less than though the railroad was on some one else's farm.

Redirect examination:

Q. That is not the question I asked you; the railroad had a right to run across that land. I asked you if you knew what the difference was with the railroad running across it, properly fenced, with the fences put up and the cattle-guards put in and without them—the difference between the rental value with the railroad properly fenced and as it is and not the difference between the land with the railroad on it and without it.

36 Objected to by defendant upon all the grounds stated in the last objection.

Objection overruled, and defendant excepted.

A. Well, I should put that at about $200 a year.

Recross-examination:

Q. You think they could raise $200 less crops on it a year?
A. That is not the idea. That is what the damages were.
Q. How do you make up those damages?
A. If this railroad runs through my place I have got to herd and watch that track for 365 days in a year.
Q. Suppose you have got no cattle?
A. But this man has got cattle.
Q. Then you think it makes a difference whether a man had cattle or not, and the more cattle he had the more damage it would be?
A. Yes, sir. That is the idea.
Q. And because this man had 50 or 60 head of cattle you place the damages at $200 a year?
A. Yes, sir.
Q. If he hadn't but five head of cattle, how much would you place the damage at?
A. I should place it just the same. It takes just as much running to turn five head of cattle off the track as it does twenty. You have got to circle them before you can head them, and it is just as much trouble to circle five head as a dozen. I would place it just the same.

37 OLE NELSON, the plaintiff, was then recalled for further cross-examination and testified as follows:

Examination by Mr. LARABEE:

My farm was adapted to all kinds of farming, raising stock, grain, timber, and I have got all kinds of it. I think grass land is worth just as much as the tillable land and a little more on account of

there being more money in raising stock than in raising grain. I think the grass land is worth the most to me.

In farming a piece of land of that size it is well to diversify the work and to have some grass land and some tillable land for different kinds of crops. There is not any difference between the east and west part in its adaptation for crops. A ravine runs through it north and south about three-quarters of a mile, commencing at the south side and going clear to the north side, between the fields.

Q. The last witness says there would be as much work to herd a few cattle as it would be to herd sixty?

A. There is more work in herding a large number.

Q. I will put it this way: It would take one man's time to watch and keep a cow off this track, and one man could keep off 60 or 100?

A. Of course there is more work in turning back or driving
38 back a drove of cattle off a railroad track than one or two head. It is more trouble to watch a big drove of cattle than a small one.

The plaintiff then rested.

The defendant introduced no evidence.

The court then charged the jury as follows:

GENTLEMEN OF THE JURY:

If you will give me your attention for a short time I will endeavor to explain to you your duties with regard to this case and the issues of fact which you are called upon to determine, and I will give you the law which should govern you in arriving at your verdict.

Ole Nelson, the plaintiff in this action, has prosecuted the Minneapolis & St. Louis Railway Company for damages. He claims that he has sustained two thousand dollars' damage by reason of the defendant failing to discharge a certain duty which the law imposes upon it during certain years from the fall of 1879 until the fall of 1885, about six years.

The defense comes in and answers this charge in the complaint of the plaintiff and denies that the plaintiff has sustained any such amount of damage, and that is the issue of fact for you to determine.

It is your duty, I will say in the first place, to find a verdict for the plaintiff in this case either for nominal damages or substantial damages as you may find the fact to be. The plaintiff seeks in this case compensatory damages. There is another kind of damages sometimes awarded to a party which are called punitive or
39 exemplary damages. The plaintiff in this case does not claim nor is he entitled to exemplary or punitive damages, but simply to compensatory damages—that is, he is entitled to have his actual damage that he has suffered compensated for in dollars and cents fully, but he is not entitled to punitive damages. Those are damages which are given, not for compensation, but by the way of punishment against a party for doing some wrongful act. It is in the nature of a penalty, not only to punish a party for

inflicting a wrong, but also as an admonition to others to prevent them from committing the same wrong in the same way.

Now, the plaintiff in this action is not entitled to damages for any anxiety of mind that he may have had with regard to his stock being killed, but he is to be compensated for what he has suffered in the loss of the use of the premises by the neglect and omission of the defendant to fence its track through his land with suitable fence and for not putting in suitable and proper cattle-guards at the crossings of the highways. Whatever amount the neglect of the defendant to build its fence or to build these cattle-guards has impaired or diminished the value of the use of this farm of the plaintiff during these six years he is entitled to recover.

Every dollar that he has expended on these premises by reason of the defendant's failing to make these fences and these cattle-guards that he would not have had to expend had they built them, that reduces the value of his farm and the use of his farm, the plaintiff can recover.

In other words and in technical language, he is entitled to
40 the difference between the rental value of the use of these premises for these six years, with the premises in the condition that they were in, and what they would have been worth had this railroad company performed its duty to build these fences and put in these cattle-guards—that is, how much less have these premises been worth to the plaintiff by reason of the defendant neglecting to fence its line of road across the plaintiff's land and putting in these cattle-guards that the law required? The law required and impose upon the defendant the duty of putting in suitable cattle-guards at the crossings of these highways. It required them to build substantial fences along each side of their track. The defendant did not do that, and the plaintiff was obliged to farm his land with these fences not built and with these cattle-guards not constructed. The question is, Did the plaintiff suffer any injury to these premises—that is, did that fact of that omission and neglect on the part of the defendant render these premises less valuable, and was it of less rental value to the plaintiff; and, if so, how much?

The plaintiff claims and says that it cost him more to carry on his farm than it would have cost had defendant built the fence and cattle-guards—that is, he was put to the expense of watching his cattle. It was a stock farm, and he used it partially for stock and partially for wheat-raising. He had a right to use these premises in such a way as he chose and as his judgment showed him to be the best. If he thought he could make more by using these premises for the purposes of stock-raising he had a perfect right to do so, and this defendant had no right to question his right so to do, nor any one else, for that matter.

41 You have been informed by the witnesses here and by the plaintiff himself as to the character of his farm, which it seems consisted of about two hundred acres, and the plaintiff has informed you how it was fenced when the road was built and how he has carried it on since during these six years. He claims that this

question of herding was a great tax upon him in farming this land and in carrying it on in the manner he thought best; that it was a great damage to him.

The first question for you to determine is, Was it necessary as a good farmer for him to herd his stock and to protect the stock in the manner that he said he did? That is a question for you to determine. He was not bound, obligated as a legal right by law, to herd his stock—that is to say, if he had not herded his stock and any of them had strayed upon the track of the defendant every day of the year and some of his stock was killed the railroad company, when he made his claim for the stock, could not come up and say to him, You ought to have herded your stock and you ought to have kept your stock off the track; that would not have been a defense for the railroad company. In other words, he could turn his stock on the farm and let them run, and if they strayed on the railroad track and got killed or hurt the railroad company, not having fenced their track, would be obliged to pay him for all damages done by them to his stock.

Then the question will present itself to your consideration whether it was good farming and if it was really necessary for a prudent man to herd his stock. There was some obligation on the part of Mr. Nelson toward this railroad company. He should not
42 do anything to increase his damage; and not only that, but he should act as a reasonable and prudent man to prevent any increase of damages on account of the neglect of the defendant; but in doing so the law will not compel him to herd his stock, and it has been decided that a man may recover his damages if he does turn his cattle out where they are liable to stray upon the railroad track if the railroad has failed to fence its track if the cattle are killed or injured on the track.

But the plaintiff in this case must use, as an ordinary prudent man, such prudence so as to prevent increase of damages. To illustrate, if one of his cattle were on the railroad tracks and the cars were coming, and he was right close to it and could get his stock off the track by reasonable effort to prevent its being killed, he would undoubtedly be under obligation to do so. But he would not have to devote his time to watching them; but if he be in a position to do so, he must exercise reasonable prudence and care to prevent his stock from being killed, and he ought to do so if he sees them exposed.

It is for you to determine whether, under all the circumstances, it was necessary for him to herd and watch his cattle to keep them off the track as a reasonably prudent man. If you come to that conclusion, that it was necessary, then — for you to determine the rental value of the use of these premises during these six years, and in determining the damages of the plaintiff you have a right to take that fact into consideration.

You are not to allow this plaintiff any damages for the
43 railroad running across his land. You are not to do that, because the defendant has bought the right of way or has condemned a right of way across there, and the plaintiff has been paid

the damages for the railroad running across his land. He has been paid for this right, with the understanding that the railroad company would perform its duty by building cattle-guards and fences. The plaintiff did not assume the risk of not having that railroad fenced or not having the cattle-guards built there, because it was understood that they would do so when they compensated him, and this at the time did not enter into the compensation. But the fact that it is inconvenient to cross with proper cattle-guards or inconvenient to have a railroad with proper fences there cannot be taken into consideration as an estimate or as an element of his damages. It is simply the inconvenience of not having a proper fence and proper cattle-guards that you are to take into consideration; and any damages arising directly from the neglect of the defendant to build these cattle-guards and this fence is legitimate for your consideration. But it is all embodied in the question, How much less has the rental value of that farm been to the plaintiff during these six years than it would have been had the defendant railroad company properly fenced its track and put in these cattle-guards?

The fact that this defendant would be liable for any damage done to cattle that strayed upon the railroad track is a matter for your consideration in estimating the plaintiff's damage—that is, it enters into this question of rental value. You are not to take into consideration any anxiety of mind that the plaintiff may
44 have suffered by reason of his cattle getting upon the track.

The question is, How much more money was the plaintiff caused to expend to get the benefit of the rental value of his farm by reason of its not having the fences and cattle-guards there than it would have been had the fences and cattle-guards been properly constructed?

That is all I can say to you. Take the testimony and weigh it carefully. You have heard all the evidence and the opinion- of the witnesses and the reasons for their opinions. A man who gives an opinion as a witness as to a fact and has no reason to back it up with, cannot give a good reason for his opinion, does not give a very valuable opinion; but it is the opinion that has some foundation for it and some reason given for it that impresses your mind and of course will sway your judgment.

Take all the evidence and consider and weigh it carefully, deciding the question without taking into consideration the status of the parties. A court of justice, of which you form a part, has no business to know anything about the parties. You are to look at the evidence and say what the rights of the parties are and to decide the case just as it seems to you is right as if the matter in controversy were between two neighbors of your own.

The defendant excepted to the following portion of the charge: "It is your duty, I will say in the first place, to find a verdict for the plaintiff in this case, either for nominal or substantial damages, as you may find the fact to be."

45 The defendant also excepted to the following portion of the charge: "But he is to be compensated for what he has suf-

fered in the loss of the use of the premises by the neglect and omission of the defendant to fence its track through his land with suitable fence and for not putting in suitable and proper cattle-guards at the crossings of the highways. Whatever amount the neglect of the defendant to build its fence or to build these cattle-guards has impaired or diminished the value of the use of this farm of the plaintiff during these six years he is entitled to recover."

The defendant also excepted to the following portion of the charge: "Every dollar that he has expended on these premises by reason of the defendant failing to make these fences and these cattle-guards that he would not have had to expend had they built them, that reduces the value of the farm and the use of his farm, the plaintiff can recover."

The defendant also excepted to the following portion of the charge: "It is for you to determine whether, under all the circumstances, it was necessary for him to herd and watch his cattle to keep them off the track as a reasonably prudent man. If you come to that conclusion, that it was necessary, then it is for you to determine the rental value of the use of these premises during these six years, and in determining the damages of the plaintiff you have a right to take that fact into consideration."

The defendant also excepted to the following portion of the charge: "The question is, How much money was the plaintiff caused to expend to get the benefit of the rental value of his
46 farm by reason of its not having the fences and cattle-guards there than it would have been had the fences and cattle-guards been properly constructed?"

Verdict.

Title as in complaint.

We, the jury in the above-entitled cause, find for the plaintiff and assess his damages at seven hundred dollars.

M. BISSINGER, *Foreman.*

I hereby certify that the foregoing case, including annexed plat, is true and correct and contains all the testimony given and the whole of the instructions given by the court to the jury at a trial of the above-entitled action, and the objections made and exceptions taken by the defendant to each of the same, and the said case is hereby allowed and signed as such.

JOHN Q. FARMER,
Judge of said Court.

Dated August 2nd, 1888.

Notice of Motion for New Trial.

Title as in complaint.

To Messrs. Lovely & Morgan and D. F. Morgan, attorneys for the above-named plaintiff:

SIRS: You will take notice that upon the pleadings in the above-

entitled action and upon the case therein, which will then have been settled by said court, the defendant above named will move
said court at the chambers of the Honorable J. Q. Farmer,
47 judge thereof, in the village of Spring Valley, in the county of Fillmore, in said State, on the 2d day of August, 1888, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for a new trial of said action upon the following grounds:

1. Excessive damages, appearing to have been given under the influence of passion and prejudice.

2. That the verdict is not justified by the evidence and is contrary to law.

3. For error in law occurring at the trial and excepted to by the defendant.

Yours, etc.,

B. S. LEWIS,
Defendant's Attorney.
J. D. SPRINGER,
General Solicitor for Defendant.

Service of within admitted this 21 day of July, 1888.
LOVELY & MORGAN,
Pl'ff's Att'y-.

Order Denying a New Trial.

Title as in complaint.

This cause came on to be heard to the court on the motion of the defendant for a new trial upon the following reasons:

1. Excessive damages, appearing to have been given under the influence of passion and prejudice.

2. That the verdict is not justified by the evidence and is contrary to law.

3. Error in law occurring at the trial and excepted to by the defendant.

B. S. Lewis, Esq., appeared as counsel for defendant, in favor of the motion; Messrs Lovely & Morgan appeared as coun-
48 sel for plaintiff, in opposition thereto.

Having read the case and heard the arguments of the respective counsel, ordered that said motion be, and the same is hereby, denied.

By the court:

JOHN Q. FARMER,
Judge of said Court.

Filed Sept. 3, 1888.
GEO. T. GARDNER,
Clerk of District Court.

Title as in complaint.

Notice of Appeal.

You will please take notice that the above-named defendant appeals to the supreme court of the State of Minnesota from the order of this court in this action entered on the 8th day of September, 1888, and dated the 3rd day of September, 1888, and denying defendant's motion for a new trial of said action.

Dated September 14th, 1888.

J. D. SPRINGER,
General Solicitor.
B. S. LEWIS,
Attorney for Defendant.

To Lovely & Morgan and D. F. Morgan, attorneys for plaintiff, and Geo. T. Gardner, Esq., clerk of the district court.

Due service accepted Oct. 1, 1888, at A. Lea, Minn.

LOVELY & MORGAN,
Pl'ff's Att'ys.
GEO. T. GARDNER, *Clerk.*

Filed Oct. 1, 1888.
GEO. T. GARDNER,
Clerk of Dist. Court.

49 *Stipulation.*

Whereas an appeal was taken in the above-entitled action to the supreme court of said State by the defendant, by a notice of appeal, dated the 14th day of September, 1884, from an order of said district court denying defendant's motion for a new trial, and on such appeal the usual bond for costs was given, and no supersedeas or stay bond was given by defendant:

Now, therefore, it is stipulated and agreed that the plaintiff shall enter judgment on the verdict in the usual form and as of and dated September 8th, 1888, and that the notice of appeal shall be amended by adding thereto the words "and from the judgment entered on the verdict in said action;" that a certified copy of such judgment and notice of appeal as amended, together with this stipulation, shall be filed in the supreme court as and become a part of the original return on said appeal, and said notice of appeal so amended shall be taken as and for and stand in place of the original notice of appeal, and the judgment, amended notice, and this stipulation shall be printed and attached to and become a part of the paper book on said appeal, and the appeal shall be determined and procedure had in the supreme court the same as an appeal from a judgment and as though originally so taken; and in all further proceedings in any court the appeal in this action shall be taken and considered for all purposes as an appeal from a judgment of the district court of Freeborn county from a judgment in this action in favor of the plaintiff and against the defendant.

50 This stipulation and proceedings under it shall in no way affect the validity of the appeal bond already given and filed.

Dated May 21st, 1889.

JOHN A. LOVELY,
One of Plaintiff's Attorneys.
B. S. LEWIS,
Defendant's Attorney.

Judgment.

This action, being at issue and on the calendar of the above-entitled court for trial at the general May term thereof for the year one thousand eight hundred and eighty-eight, was tried before the Hon. J. Q. Farmer, judge thereof, and a jury, and the jury having, on the 17th day of May, 1888, returned a verdict therein in favor of the plaintiff and against the defendant for the sum of $700.00, and the costs having been taxed in the sum of $42.78:

Now, therefore, on motion of Lovely & Morgan, attorneys for said plaintiff, it is adjudged that the plaintiff, Ole Nelson, receive of the defendant, The Minneapolis & St. Louis Railway Company, the sum of seven hundred and fifteen dollars and thirty-five cents damages and forty-two dollars and seventy-eight cents costs; in the whole, seven hundred and fifty-eight dollars and thirteen cents.

Dated September 8th, 1888.

J. Q. ANNIS,
Clerk Dist. Court.

51 Title as in complaint.

Amended Notice of Appeal.

You will please take notice that the above-named defendant appeals to the supreme court of the State of Minnesota from an order of this court in this action entered on the 8th day of September, 1888, and dated the 3rd day of September, 1888, and denying defendant's motion for a new trial of said action, and from the judgment entered on the verdict in said action.

Dated September 14th, 1888.

J. D. SPRINGER,
General Solicitor.
B. S. LEWIS,
Attorney for Defendant.

To Lovely & Morgan and D. F. Morgan, attorneys for plaintiff, and Geo. T. Gardner, clerk of the district court.

(Here follows diagram marked p. 52.)

53 STATE OF MINNESOTA, }
County of Freeborn. }

I, Geo. T. Gardner, clerk of the district court in and for the county and State aforesaid, do hereby certify that I have compared the foregoing with the original summons, complaint, answer, notice of motion for new trial, order denying the same, settled case, plaintiff's amendments thereto, notice and bond of appeal to the supreme court, exhibits, verdict, etc., all remaining on file in my office, and that the same is a true and correct transcript of said originals.

In testimony whereof witness my hand and the seal of said court, at Albert Lea, in said county, this 24th day of Nov., 1888.

(Signed) GEO. T. GARDNER,
[SEAL.] *Clerk of District Court.*

54 State of Minnesota Supreme Court, April Term, 1889.

OLE NELSON, Respondent,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Appellant.

Appellant's Brief.

B. S. Lewis and J. D. Springer, attorneys for appellant.

55 State of Minnesota Supreme Court.

OLE NELSON, Respondent,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Appellant.

Assignment of Errors.

56 First. The court erred in overruling the objection of the defendant to the introduction of any evidence by the plaintiff under the complaint for the reasons stated in the objection. Paper book, folio 10.

Second. The court erred in allowing answers to each or either of the following questions:

1. "Q. How many cattle did you have on that farm at the time the railroad was built and since until the commencement of this action?" Folio 17.

2. "Q. How did you let your cattle run up to the time the railroad was built across there and until the beginning of this action?" Folio 21.

3. Why he (the plaintiff) had to keep a man to herd his cattle. Folios 19 and 22.

4. "Q. How much of the time was this herding done each year after the railroad was built up to the commencement of this action?" Folio 24.

5. "Q. Did you have to take up your stock nights?" Folio 29.

6. "Q. Did you let your horses run?" Folio 30.

7. Why he (plaintiff) had made changes in his pasture fences. Folio 46.

8. The manner in which the plaintiff conducted his farm. Folio 47.

Third. The court erred in allowing an answer to the following question:

"Q. At the time the railroad company built its road across your farm the way it did how did its neglect to build that fence and the cattle-guards interfere with your free use and occupation of that farm?" Folio 18.

57 Fourth. The court erred in allowing evidence to be given that plaintiff was damaged by reason of the liability of his cattle to get into his neighbors' fields and in refusing to strike out the answers when given. Folios 22, 23.

Fifth. The court erred in allowing plaintiff to answer either or each of the following questions:

1. "Q. I will now ask you this question—if you know what the difference is you can answer by yes or no—if you know what the difference between the rental value of that farm was between the 1st day of November, 1879, and the 19th day of October, 1885, by reason of the neglect of the defendant railroad company to build fences on each side of its track and cattle-guards at the road crossing where it entered and left your farm." Folio 26.

2. "Q. I will ask you what was the difference in the value per year caused by the neglect of the railroad company to put cattle-guards in between those times." Folio 27.

And also in allowing substantially the same question to be asked and answered by other witnesses and found in folios 50, 51, 57, and 59.

Sixth. The court erred in giving each or either of the following instructions to the jury:

1. "It is your duty, I will say in the first place, to find a verdict for the plaintiff in this case either for nominal or substantial damages, as you may find the fact to be." Folios 65 and 77.

58 2. "But he is to be compensated for what he has suffered in the loss of the use of the premises by the neglect and omission of the defendant to fence its track through his land with suitable fence and for not putting in suitable and proper cattle-guards at the crossings of the highways. Whatever amount the neglect of the defendant to build its fences or to build these cattle-guards has impaired or diminished the value of the use of this farm of the plaintiff during these six years he is entitled to recover." Folios 66 and 78.

Seventh. The court erred in instructing the jury as follows:

"Every dollar that he has expended on these premises by reason of the defendant's failing to make these fences and these cattle-guards that he would not have had to expend had they built them, that reduces the value of his farm and the use of his farm, the plaintiff can recover." Folios 67 and 78.

Eighth. The court erred in instructing the jury as follows:

"It is for you to determine whether, under all the circumstances,

it was necessary for him to herd and watch his cattle to keep them off the track as a reasonably prudent man. If you come to that conclusion, that it was necessary, then it is for you to determine the rental value of the use of these premises during these six years, and in determining the damages of the plaintiff you have a right to take that fact into consideration." Folios 73 and 79.

59 Ninth. The court erred in instructing the jury as follows:

"The question is, How much more money was the plaintiff caused to expend to get the benefit of the rental value of his farm by reason of its not having the fences and cattle-guards there than it would have been had the fences and cattle-guards been properly constructed?" Folio 76 and 79.

Tenth. The court erred in denying the defendant's motion for a new trial—

Because of error in law occurring at the trial and excepted to by defendant. Folio 83.

Eleventh. The court erred in denying the defendants' motion for a new trial—

Because the verdict is not justified by the evidence and is contrary to law. Folio 83.

Statement of Facts.

The plaintiff was and is the owner of two hundred acres of land in Freeborn county.

In 1879 and before the defendant built its railroad the plaintiff conveyed to the defendant by deed a strip of land one hundred feet in width, upon which, afterwards and in the same year, the railroad was built. The defendant has remained such owner ever since. Folio 11. There are highways along the east and south sides of plaintiff's farm, and the railway runs across the southeast corner,

60 intersecting both highways. The length of the railway between the highways is about seventy rods.

For a more particular description of the location of the highways, railway, buildings, and fields see map attached to paper book.

When the railroad was built the square quarter section only was fenced, and there was a pasture of thirty acres on the southeast forty acres, which was separated from the balance of the farm by a fence, and the remainder of the enclosed land was used for raising grain and hay. The railroad passed through both the pasture and plowed fields. The use then made of the extreme north forty acres does not appear.

After building the road the defendant did not fence its track where it crossed the plaintiff's land, nor put cattle-guards at these highway crossings, and such neglect was continued until this action was commenced, in October, 1885.

The plaintiff brings this action to recover the damages sustained by him as the owner of this farm on account of this neglect of defendant to build and maintain fences and cattle-guards.

The plaintiff alleges in this complaint that this neglect has dam-

aged him in three ways: First, on account of the imminent "danger and peril" of his stock and cattle; second, on account of his great injury and annoyance during all of said time, whereby he has been compelled to spend a great deal of time and money in watching and keeping his stock from escaping onto the track and being there killed and injured; third, and because he has been thereby deprived of the free and beneficial use, enjoyment, and occu-
61 pation of his farm and the value and use of its occupation greatly diminished and its value for stock-raising totally destroyed. Folio 6.

The trial court, notwithstanding the objection and exception of the defendant, allowed evidence to be given embracing each of these elements of damages, and also allowed evidence, under objection, to the effect that because the road was unfenced plaintiff had to herd his cattle to prevent them from straying into his neighbors' fields. The plaintiff kept a larger number of horses and cattle than his farm of two hundred acres could sustain (folios 19, 34, and 44), and he leased both before and after the railroad was built an unfenced tract of land near by and herded the most of his stock on this leased land in the summer time and raised grain on the most of his own farm, keeping his stock on his farm after the crops were removed. All of this evidence was given notwithstanding defendant's objection.

The plaintiff testified that the depreciation in the rental value of his farm because of the neglect to build fences was $400.00 per year. (This was objected to.) Folios 26, 27.

On direct examination he testified that he arrived at this amount "on account of the herding and bother all the time, winter and summer" (folio 28), and on cross-examination that it was for herding and the bother he had been to and the trouble he had had in keeping his cattle on the highway as he was driving them to the leased land from his farm every morning and returning in the evening
62 (folios 35 and 37), and that the difference of $400.00 was caused entirely by the herding. Folio 42.

Louis Marpe (plaintiff's witness), after testifying that he was a farmer, living four miles away, and that he knew plaintiff's farm and how he carried it on, testified on direct examination, under objection, that the depreciation in the rental value of the farm was three hundred dollars per year. Folios 47–51.

On cross-examination this witness testified that farms were always rented on shares; that the share the owner would get, if the railroad was unfenced, would depend on how much stock the tenant wanted to keep, and that he could not tell how much it would rent for, anyway, as but few farms were rented. Folios 51–54.

James McGuire (plaintiff's witness), after testifying that he lived three-quarters of a mile away, that he knew plaintiff's farm and how he carried it on, testified on direct examination and under objection that the depreciation in rental value was $200.00 per year. Folios 57–60.

On cross-examination this witness said he did not arrive at the difference of two hundred dollars per year because less crops would

be raised, but because the plaintiff had a large number of cattle and they had to be herded and watched. Folios 60, 61.

These were the only witnesses who testified as to plaintiff's damages. The plaintiff recovered a verdict of $700. The defendant moved for a new trial (folio 82), upon a settled case and it was denied.

63 The defendant is a corporation created by an act of the legislature of the Territory of Minnesota approved March 3rd, 1853, entitled "An act to incorporate the Minnesota Western Railway Company." There are no express words stating whether this act is a public or private statute.

Any act of the legislature which creates a highway or railway corporation is a public act, because the corporation is vested with certain public functions and has certain public duties to perform and because the whole public are interested in the performance of this duty.

Smith's Com., sec. 802–809 and cases cited.

If this be not so, and if it were originally a private act, then, if it has since been recognized as existing by a public statute, it thereafter becomes a public statute.

Roger's Case, 2 Greenl. R., 301.

Samuel *vs.* Evans, 2 D. & D., 569.

The territorial legislature, by a public act, chap. 65, Laws of 1855, recognized the act of 1853 as an existing act.

The legislature, by chap. 57, Special Laws of 1870, authorized the company to change its name, and afterwards the legislature, by chap. 113, Special Laws of 1881, recognized the fact that the name of the corporation had been changed to the Minneapolis & St. Louis Railway Company.

64 The several statutes creating this corporation have been recognized by the supreme court as public acts.

Brakken *vs.* M. & St. L. R'y Co., 29 Minn., 41, 44.

The act of 1853 with the amendatory acts are therefore public acts, of which the court will take judicial cognizance.

On this appeal we are fully aware of the rule laid down in Emmons *vs.* M. & St. L. R'y, 35 Minn., 503, and that it was followed as *res adjudicata* between the parties in the second appeal, 36 N. W. R., 340. There is, however, no rule, except that of *stare decisis*, to prevent the court reconsidering the question involved in the Emmons case and changing it if now convinced that it is erroneous.

We hope to so convince the court on this appeal.

I.

The first, third, fifth, sixth, and tenth assignment of errors may be considered together, as they all involve the right of the plaintiff to recover any damages in this class of actions.

The damages sought to be recovered are of three kinds—first, for the danger to his stock; second, his annoyance and expense in

watching them; third, the depreciation in rental value of his farm.

65 There is no claim for damages because of animals actually killed or injured or occurring in the actual operation of the railroad.

In other words, the plaintiff seeks to recover damages alleged to have been sustained by him as a land-owner, because the defendant, an adjoining land-owner, operated an unfenced railroad alongside of two parcels of land owned by him.

The defendant acquired the fee of the strip of land over which its railroad was built by purchase from the plaintiff. Folio 11.

If the railroad were not built and operated upon this strip the respective rights and duties of the two parties would only be those of adjoining land-owners.

No duty to fence this strip on the part of the defendant as a land-owner, and arising out of contract, or the mode in which it acquired its land, is alleged or claimed by the plaintiff.

No duty on the part of the defendant as a land-owner in favor of the plaintiff as an adjoining land-owner exists at common law.

Ward *vs.* R'y, 4th Fed. R., 862, and cases cited.

The statutes creating the defendant corporation are all silent on the question of fences. No charter duty therefore exists requiring the defendant to build partition fences between its lands and those of an adjoining proprietor.

If the defendant owes no duty arising either by contract, the mode of acquiring this land, the common law, or its charter to build partition fences for the benefit of an adjoining land-owner,

66 then any statute or construction of a statute which compels the defendant to build partition fences for the benefit of an adjoining land-owner, or to pay damages for not building, is an infringement upon the defendant's existing and vested rights and a violation of the contract right given in its charter to buy and hold land for specified purposes the same as any other land-owner.

Any such construction of a statute is contrary to section two of article one of our State constitution, which forbids the depriving of any citizen any rights or privileges secured to him unless by law of the land, and is also contrary to section eleven of the same article, which says that no law impairing obligation of contract shall ever be passed.

Any such statute or construction of statute is also in violation of article one of section ten of the Constitution of the United States, which forbids any State to pass any law impairing the obligation of contracts, and also of the fourteenth amendment to the Constitution of the United States, which forbids any State to make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, or to deprive any person of life, liberty, or property without due process of law, or to deny any person within its jurisdiction the equal privileges of the law.

It is claimed, however, that the duty of the defendant to build this partition fence is derived from sections 54 and 57 of chap. 34,

G. S., 1878. This statute was first enacted long subsequent to the statute creating the defendant.

So far as the object and purposes of this statute come within
67 reasonable police regulation, it can be enforced as such. Any construction which extends the operation of the statute or the damages recoverable under it beyond what is necessary for police regulation, or to purposes which are not in themselves police regulations, is a violation of both the national and State constitutions.

In other words, we insist that to so construe the statute and create a new duty upon the defendant toward adjoining land-owners, to build partition fences, or mulct it in damages at the suit of the land-owner for not building is such violation of the two constitutions.

Tiedeman on Police Powers, page 584, and cases cited.
Cooley's Con. Lim., page 578, and cases cited.
Sedgewick Con. Law, page- 434–439, and notes.

We shall attempt to show the limit of this statute as a police regulation and that the attempted application in this case is not within the bounds of police regulation.

(A.) The railroad fencing statutes, as applied to corporations whose charters are silent on the question of fencing, can only be upheld as an exercise of the police power of the State.

Gillam *vs.* R'y, 26 Minn., 268.
Smith *vs.* M. & St. L. R'y, 37 Minn., 103.

68 The purpose of the statute was to prevent domestic animals from coming on the railway tracks, with the consequent danger to the animals themselves and to the passengers and employés upon railway trains, and imposes no duty to fence as respects children.

Fitzgerald *vs.* R'y, 29 Minn., 336, 340.

"The object" (of the fence law) "was not to benefit those lands—that is, to improve and render them more valuable—but to prevent, as far as possible, injury to them from maintaining and operating a railroad through and alongside of them."

Emmons *vs.* M. & St. L. R'y, 35 Minn., 503, 505.

(We hope to show in this case that the last clause of above is not the law.)

The railroad fence law "is not a partition or line-fence law, but a police regulation, the object of which is to inclose the roads so that cattle cannot get upon them."

Smith *vs.* M. & St. L. R'y, 37 Minn., 103.

The words "all damages" in section 57, chap. 34, are not to be taken literally, but subject to such qualifications as the rules of law impose in analogous cases.

Fleming *vs.* R'y, 27 Minn., 113, 115.

69 The damages recoverable must be the natural and proximate result of the non-fencing, such as the late Mr. Justice Berry aptly styled "railroad damages."

Nelson *vs.* R'y, 30 Minn., 74.

The statute is designed for the protection of all and not merely rules for the construction of division fences between adjoining land-owners for the neglect of which only an adjoining owner may complain.

Gillam *vs.* R'y, 26 Minn., 268, 271.

It needs no extensive citation from other courts to show that railroad-fence laws are upheld only as police regulations and because of the great danger to life and property if animals are not prevented from straying on the track.

The prevention of this danger is the limit of the police regulation.

The neglect to fence is a violation of a public duty, and if the adjoining land-owner is deprived of a partition fence by the neglect of this public duty, and if the building of such partition fence by the railroad company for his benefit is not the object or purpose of the statute, then the land-owner cannot be said to be specially injured and he has no right of action for the violation of this public duty.

Dawson *vs.* St. Paul, etc., 15 Minn., 136.
Rochette *vs.* R'y, 32 Minn., 201.
Shero *vs.* Cary, 35 Minn., 423.

70 A railway company owes no duty to the owner of abutting lands to build a detached piece of fence (which encloses no part of the railroad) on the line between the station grounds and the abutting premises.

Smith *vs.* M. & St. L. R'y, 37 Minn., 103, 105.

If, then, at places other than stations, it can inclose its road or track without building a partition fence, it owes no duty to the adjoining land-owner to build any other fences.

The legitimate object and purpose of the railroad-fence law being only to inclose the road so as to prevent animals from getting on the track, and there being no duty imposed on this defendant toward the plaintiff by contract, its charter, common law, or the statute in question to build partition or line fences between the lands of each, it follows conclusively that the defendant might and would have performed its public duty and fully accomplished the object and purpose of the law if it had constructed cattle-guards at the highways and fences ten feet distant on either side from its track.

By so doing animals would have been kept from the track, trains would have been moved with safety, and the public duty would have been performed. The plaintiff, however, would not have had partition fences built for him; his land would have been unfenced; his cattle could have strayed into his neighbors' fields, be liable to

get upon the railroad track elsewhere if it was unfenced except through his lands; his neighbors' cattle could trespass upon his land; he would have had to suffer the annoyance and expense of watching his stock, and the rental value of his farm would be depreciated, because he did not build such boundary fences as he needed instead of waiting for some one else to build them for
71 him. In fact he would suffer all the demages which he complains of in this action, although the defendant had fully satisfied the object and purpose of the statute.

If, then, the defendant, owning a strip of land 100 feet in width, can inclose its road by fencing a narrow strip it has done all the State can require of it. To require it to do more and to build all the partition fences between its lands and those of the adjoining proprietor is beyond the scope of police regulation and an infringement upon its vested and charter rights.

It is only the neglect to build a partition fence that can create a special injury to the adjoining land-owner or an injury differing from that other land-owners suffer.

(B.) But it may be asked (as the writer was asked by this court on the argument of the second appeal of Emmons against this defendant), "The statute requires the road to be fenced, and can the road be said to be fenced unless the fences are placed at the extreme limits of the right of way?" In other words, can the road be said to be fenced within the meaning of the statute unless the whole right of way is fenced?

The word "road" as used must be construed with reference to the object and purpose of the statute, and any definition of the word "road" which will satisfy this object and purpose must be sufficient.

To construe the word "road" as meaning the track or tracks upon which the railroad business is done will accomplish the purpose of the statute, and it is not necessary to extend its meaning so as to include the whole right of way.

If the necessities of police regulation is the limit to which
72 the statute can be extended, and if by construing the word "road" to mean the track or tracks will satisfy the requirements of the police regulation, then it is an infringement on our vested rights to construe it as meaning the "right of way" if such construction carries with it consequences and liabilities which are not within proper police regulation.

If the word "road" means the "right of way," then in the case of a land-grant railroad which is built across an odd-numbered section which it still owns would the right of way include the whole section so as to require the company to build partition fences between it and all the land adjoining the section?

If the railway company in purchasing its right of way should in some places purchase a wider strip than it then required, because it might need it in the future as a gravel pit or for station grounds, would the whole width so purchased have to be fenced as its right of way?

If such a construction of the statute is not required in such cases why should it be required in any case?

We insist, therefore, that if the railway company fences its track or tracks it has complied with the statute, even if the whole right of way is not fenced.

(C.) The nature of the plaintiff's claim and that it involves consequences and liabilities not contemplated by the statute and which are an infring-ment upon our vested rights can be better understood by stating supposable cases which might readily occur:

73 1. The plaintiff's land being situated and crossed by the railroad, as it is, if the defendant should fence a strip ten feet in width on each side of the center of its track, with cattle-guards at the highways, and should not fence its track in either direction from the plaintiff's land, the plaintiff's land and stock would be exposed to all the dangers of an unfenced railroad. The danger would be almost equal in amount and of precisely the same nature as though the defendant had built no fence whatever on the plaintiff's land.

2. Again, if the defendant's road be entirely unfenced and between its right of way and the plaintiff's land a third party had an unfenced and unimproved strip of land a few rods wide, the plaintiff's land and stock would in such case be exposed to all the dangers of an unfenced railroad. The danger would be equal in amount and of precisely the same nature as though the plaintiff's land adjoined the right of way.

In either of the above cases the defendant would not be liable to the plaintiff for the damages claimed in this case, and such is the intimation of this court in the Emmons case.

If it were otherwise and the defendant was liable to the plaintiff in either of the supposed cases, then any land-owner from whose land a highway led to an unfenced railroad or between whose land and the railroad lay unfenced and unimproved land could recover of the railroad company for moneys expended in guarding his stock and for the depreciation in rental value, regardless of the distance to the railroad. It would simply be a question whether the land-owner could satisfy a jury that he expended the money and

74 that the rental value was less. In every case the damages would be precisely the same in kind as in the above supposed cases. They would only differ in degree, and the degree would depend on the nearness and remoteness of the farm.

If the railroad company is "liable for all damages sustained by any person," regardless whether such damages are within the purpose and object of the statute, then, since the statute does not confine the recovery to adjoining land-owners, how can this court interpolate the limitation into the statute, and deny the land-owner in last illustration, for example, the right of recovery.

The general public can be said to own lands the same as it can be said that the general public travels a particular highway.

The absolute right to own land and to travel is the same.

But few only of the general public have occasion to or actually do travel over any particular highway. Those, however, who have a desire to travel over an obstructed highway cannot, simply because

of their desire to travel, maintain an action because of the obstruction.

A special injury must exist. The special injury in such case must differ in kind as well as in degree from the injuries suffered by that portion of the general public which has occasion to travel the highway.

Dawson *vs.* St. Paul, etc., 15 Minn., 136.
Rochette *vs.* R'y, 32 Minn., 201.
Shero *vs.* Cary, 35 Minn., 423.

75 So a few *a* only of the general public own farms which are injured by an unfenced railroad, but those few cannot maintain an action simply because of their ownership, because as such they are only part of the public.

Nor can a land-owner whose lands adjoin the railroad recover because of this fact. He does not suffer a special injury, because, as we have shown, his damages differ only in degree and not in kind from the other land-owners.

Nor do we owe him any private duty by contract, our charter, or otherwise to prevent this general damage which he sustains in common with those others of the general public who own lands.

Therefore he has no right of action against us for the violation of our public duty.

In case of an obstruction of a public highway a private action against the obstructor is not given to the owner of the land adjacent to the obstruction simply because of the ownership.

And an action may lie against the obstructor in favor of one who owns land at a distance. It is not the fact of land ownership nor its nearness or remot-ness to the obstruction which gives the private right of action, but other considerations which are too familiar to require repetition.

(D.) To put a judicial construction upon the railroad-fence law which would require the defendant, either as a penalty or as
76 a legal duty, to pay damages for non-fencing to a particular class of persons—*i. e.*, adjoining land-owners—and not to others suffering injury of the same character (we think we have shown that all land-owners suffer injury of like character) would be a violation both of the spirit and words of the fourteenth amendment to the Federal Constitution, which forbids any State to deny any person within its jurisdiction the equal protection of the laws.

It would also be a violation of the State constitution, which declares that no member of this State shall be deprived of the rights and privileges secured to any citizen thereof. Such legislation would be partial and unequal.

Cooley Con. Lim., page 392, etc.
Durkee *vs.* Janesville, 28 Wis., 464.
In re Parrot, 1 Fed. R., 481.
Holden *vs.* James, 11 Mass., 396.
Nichols *vs.* Walter, 33 N. W. R., 800.

Nor can all land-owners recover damages because, as we have shown, those damages are simply sustained by them as members of the body politic.

(E.) The railroad-fence law is penal in its character. This is shown by section fifty-six.

The law is aimed against a certain class of corporations and is derogatory to the rights of the corporation. Such laws are penal in their character.

Sprague *vs.* Birdsall, 2 Cowen, 419.

77 It is in derogation of the common law and of the rights of property of the corporation, and is therefore penal in its character.

Melody *vs.* Rea, 4 Mass., 471.
Gibson *vs.* Fenny, 15 Mass., 204.
Sharp *vs.* Spier, 4 Hill, 76.

The general words of a penal statute must be restrained for the benefit of him against whom the penalty is inflicted.

Under this rule the doctrine of the Fleming case, that the general liability imposed by section fifty-seven is subject to such qualifications as the rules of law impose in analogous cases, should be strictly followed.

The well-established rule that a special injury must be shown before a person can recover for the violation of the public duty should be followed in this case.

Nor should the settled rules of law be subverted by giving the damages claimed in this case to all persons, whether they adjoin the railroad or not.

(F.) We do not claim that the damages to be recovered under section fifty-seven are limited to stock and cattle. Within the damages intended to be covered by that section can be mentioned injuries to animals, to employés, to passengers, to the driver of a team, as, for instance, if the driver as well as the team had been injured, as in the case of Maher *vs.* R'y, 31 Minn., 401.

78 Damages such as have been indicated are direct and proximate and within the object and purpose of the law. They are recoverable whether the person injured owns land adjoining the railroad or not or whether his cattle which are injured are kept on adjacent lands or not. They are recoverable because they are special and differ both in kind and in degree from any which the general public sustain.

(G.) If in a particular condemnation proceeding the damages to the land-owner were assessed on the theory that the railroad would build and maintain boundary fences on the line of the right of way and such fences should not be built, the land-owner, setting up these facts and the record of the condemnation proceedings, might maintain an action for such damages as are claimed in this case or he might maintain an action to compel the building of the fence. Such action, however, would not be brought on the railroad-fence statute, but upon the peculiar circumstances of the condemnation proceedings.

In this case, however, the defendant became the owner of the land by purchase, and the action must be maintained, if at all, by virtue of the statute.

We insist, therefore, that we have shown the first, fifth, sixth, and tenth assignments of error to have been well taken, and that the court erred in permitting any evidence to be given and also — instructing the jury to find a verdict for the plaintiff for either nominal or substantial damages. Folio 65.

79 II.

The Seventh and Ninth Assignments of Error.

The court instructed that "every dollar that he" (the plaintiff) "had expended on these premises by reason of the defendant's failing to make these fences and these cattle-guards that he would not have had to expend had they built them, that reduces the value of the farm and the use of his farm, the plaintiff can recover." Folios 67, 78, and 7th assignment of error.

The court also instructed the jury that "the question is, How much money was the plaintiff caused to expend to get the benefit of the rental value of his farm by reason of its not having the fences and cattle-guards there than it would have been had the fences and cattle-guards been properly constructed?" Folios 76, 79, and ninth assignment of error.

In the case of Emmons *vs.* The M. & St. L. R'y, 37 N. W. R., 340, the court held in a case like this that the diminution in the rental value because of the non-fencing was the proper measure of damages.

The present appellant in that case argued that the diminution in the rental value was not the measure of damages unless the land-owner had rented his farm; that when the land-owner was in possession and tilled his own farm (as in this case) the measure of damages was the cost necessarily and prudently incurred of protecting his animals while on the farm from the dangers of an unfenced railroad and the value of animals actually killed or injured.

80 The counsel for Mr. Emmons, who are the counsel for the present respondent, argued that the measure of damages was the diminution in the rental value even if the land-owner was in possession and cultivated his farm.

This was the issue presented on that appeal, and after consideration this court decided that the diminution in rental value was the proper measure of damages.

The trial court disregarded this rule and instructed the jury that the plaintiff could recover every dollar he had expended because of the neglect to fence (seventh assignment of errors). It is true that the court followed this instruction by saying: "In other words and in technical language, he is entitled to the difference between the rental value of the use of these premises for these six years, with the premises in the condition that they were in, and what they would have been worth had this railroad company performed its duty to build these fences and put in these cattle-guards. Folio 67.

It seems perfectly plain that the two instructions are inconsistent. The expense the plaintiff had incurred was not the difference in rental value. The difference in rental value might be more or less than the moneys expended.

If the difference in rental value is the measure of damages, then the plaintiff has no right to charge us with more than this difference, however prudently he may have thought he was acting. On the other hand, appellant cannot reduce the difference in rental value by showing that plaintiff's money expenditures were a less sum.

81 The difference in rental value is a question depending on the character and size of the farm. If the farm is better suited for grain than grazing, the difference would depend on that fact, and not in any case on how much he had expended in watching his stock. The court allowed the trial to be conducted on the theory that what the plaintiff did was the test by which the damages were to be ascertained; that this theory was erroneous we shall attempt to show hereafter.

After allowing the minds of the jury to be repeatedly turned to the actual operations of the plaintiff the court gave the instruction that the plaintiff could recover the money expended and followed it up by the misleading and incorrect assertion that such amount was the same as the difference in rental value.

The court afterwards and just at the close of his charge, and as if to more firmly fix the theory of the court upon their minds, instructed them that the question was how much more money was the plaintiff caused to expend to get the benefit of the rental value of his farm. (Ninth assignment.)

This time the court said nothing about the difference in the rental value being the measure of damages.

We insist that it was error to so repeatedly instruct the jury, and that they must necessarily have been mislead to our injury.

III.

Second Assignment of Errors.

82 The court allowed the following question to be asked and answered notwithstanding the defendant's objection and exception:

"Q. How did you let your cattle run up to the time the railroad was built across there and until the beginning of this action?"

And also other questions of a like character, which are found in folios 17, 19, 22, 24, 29, 30, 46, and 47, all of which constitute the second assignment of errors.

The rule of damages as established in the Emmons case is the diminution in the rental value of the farm because of the non-fencing. The determination of this question does not depend on how the plaintiff used his farm or what he did.

It is an abstract question to be answered by competent witnesses who are acquainted with the farm, testifying as to their opinion of the rental value with the fences built and the rental value without the fences.

Such a witness would form his opinion from the character of the soil, its best adaptability to this or that kind of farming, the size and character of the buildings, how it was surrounded and divided up by fences, the number of cattle that could in good husbandry be properly kept upon it, and whether it would be necessary to herd them at all, and other considerations of this character. A witness might probably be asked questions calculated to elicit such testimony for the purpose of showing to the jury the value of his evidence.

The evidence asked for and given was not directed to what use could be made of the farm under the circumstances in the
83 course of good husbandry by a prudent man, nor was there any evidence asked for or given that the plaintiff was a careful and prudent man and a good farmer. There is no presumption that the plaintiff was a prudent man and conducted his farm in a reasonably prudent manner. It is perfectly immaterial of the issue involved how the plaintiff conducted his farm.

It is also incompetent, as shown by his testimony, that at the time the railroad was built he had a pasture of thirty acres, folios 16, 31, 32; that his pasture was not large enough for the stock he then kept, folio 32; that he rented a farm near by on which he herded such cattle as he did not keep in the pasture, folios 19 and 33; that he always had more cattle than could be kept on the 200 acres, folio 34; that he kept about the same number of cattle and horses after the railroad was built as before, folio 18, and that he had to lease the adjoining land whether the road ran across his land or not, because he had too many cattle for his land, and that it required a man to herd them on the leased land, but not when they were kept on his own land (after the crops were removed) if the railroad had not come there. Folio 44.

If the way the plaintiff conducted farming operations was material and competent, then the measure of damages would be the cost of herding such additional cattle as he kept on the leased land because the railroad was unfenced and the cost of herding on his own land after the crops were removed.

His cost of herding has nothing to do with the difference in rental value, and the jury must have been mislead by the evidence to our injury.

84 IV.

Eighth Assignment of Errors.

The court instructed the jury that "it is for you to determine whether, under all the circumstances, it was necessary for him to herd and watch his cattle to keep them off the track as a reasonably prudent man. If you come to that conclusion, that it was necessary, then it is for you to determine the rental value of the use of these premises during these six years, and in determining the damages of the plaintiff you have a right to take that fact into consideration." Folios 73, 79, eighth assignment of error. The special vice of this instruction was that there was no allegation in the complaint

that it was necessary for him, as a prudent man, to watch and herd his cattle, nor was there a word of evidence showing that a reasonable and prudent man could not have realized more by raising grain and hay instead of cattle.

There was no allegation or evidence to which these instructions could apply, and a jury would be mislead and suppose that there was such issue and evidence.

V.

Fourth Assignment of Error.

85 The plaintiff testified, though not in response to a question, that one reason why he had to herd his cattle was to prevent them from getting into his neighbors' fields. The court refused to strike out this testimony and then allowed the witness to testify, notwithstanding defendant's objection, that the reason they would get into the neighbors' fields was because the railroad was not fenced. Folios 22, 23.

The object and purpose of this evidence must have been to make the jury believe that this class of danger entered into plaintiff's damage and thus increase the difference in rental value.

If this were proper, then it would also be proper to show that his cattle had escaped without his fault into his neighbor's fields, and that he had been sued by the neighbor and compelled to pay large sums for the damages done and the expenses of his lawsuit, including attorney's fees, and have the jury, after it had been surfeited with these items, include them in the difference in rental value. Perhaps, also, the court would then instruct the jury that the plaintiff could recover every dollar he had expended because of the non-fencing.

Certainly this is construing the words "all damages" so as to include matters not contemplated by the legislature. It is at least somewhat (?) foreign to the object and purpose of the statute.

VI.

Eleventh Assignment of Error.

86 The court erred in denying our motion for a new trial because the verdict was not justified by the evidence. Folio 83.

There was no competent evidence upon the question of the difference in the rental value because of the non-fencing.

In answer to a direct question the plaintiff answered that the difference in the rental value per year of his farm caused by the neglect of the defendant was $400.00 per year. Folios 26–28.

On cross-examination he testified that the $400.00 damages included the cost of herding, folio 23; that he called all of the $400.00 for herding and bother he had been to, folio 34; that the bother included the driving of the cattle across the railroad to and from the herding grounds on the leased land, folios 34, 37; that the difference of $400.00 per year was caused by the herding entirely, folio

42, and in keeping them off the railroad as he drove them along the highway to and from the leased land. Folio 43.

The evidence on direct examination was simply the opinion of the witness as to the difference in rental value.

Van Dusen *vs.* Young, 29 N. Y., 9, 26, 36.
Todd *vs.* M. & St. L. R'y, 39 N. W. R., 318.

The cross-examination shows that the opinion of the witness was formed by taking into account only certain facts, which have nothing to do with the difference in rental value.

If, then, the opinion was formed on an erroneous basis, the opinion is of no value and does not tend to support the verdict.

87 Plaintiff's witness, Louis Marpe, first answered, in response to a question asking for the difference in rental value, that if he was going to buy the farm he would not give within $700 of what he would if the railroad was not there, folio 49. Afterwards, and when the question had been several times repeated, he answered that he would not lay it at less than $300 damages to the place. Folios 50, 51.

On cross-examination this witness said that farms were always rented on shares in his section of the country and that the usual share was one-third. When asked how much share a man could get with the railroad unfenced, replied: "I do not know. I cannot tell you. I do not know what a farm would rent for in this shape." Folio 53.

This witness was so obtuse that he could not comprehend what was meant by the difference in rental value. Finally plaintiff's attorney drew an opinion from him. On cross-examination, however, he shows that he knows nothing about it, and that his opinion was a mere guess, not founded on any facts.

This evidence was of no value and does not tend to support the verdict.

Plaintiff's witness, P. Honan, was not asked as to the difference in rental value, folio 26. His answer, "$200.00 per year," is of no value, because there is nothing to show whether it refers to the whole rental value, with or without a fence, or the difference. This will not support the verdict.

Plaintiff's witness, James McGuire, on direct examination, gave his opinion that the difference in rental value was $200.00 per year. Folio 60.

88 On cross-examination he said he arrived at this amount because the plaintiff had fifty or sixty head of cattle which he has to watch for 365 days in the year, folios 60, 61. It can readily be seen that a farm might be so fenced and operated that with ordinary and prudent management cattle would not have to be herded and watched at all. This witness, however, looked only to the expense of the plaintiff and not to the character or capacity of the farm. This evidence is of no value upon the question of the difference in rental value for the reasons stated in relation to the plaintiff's evidence.

The foregoing is all the evidence given on the question of the

plaintiff's damage, and under the rule in the Emmons case, if the rule there laid down is to be followed in this case, there was no evidence to support any verdict.

The order denying a new trial should be reversed.

B. S. LEWIS,
Attorney for Appellant.

89 STATE OF MINNESOTA:

Supreme Court, April Term, 1889.

OLE NELSON, Respondent,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Appellant.

Respondent's Brief.

Lovely, Morgan & Morgan and Walter F. Trask, attorneys for respondent.

90 STATE OF MINNESOTA:

Supreme Court, April Term, 1889.

OLE NELSON, Respondent,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Appellant.

I.

91 We understand it to be conceded that the question considered so fully by counsel under the first point in his brief is *res adjudicata* in this court.

Emmons *vs.* M. & St. L. R'y Co., 35 Minn. (second appeal, 36 N. W. Rep., 340.)

But it is urged that no other rule than *stare decisis* prevents the court from reconsidering its former judgments. We yield to this salutary rule, and insist that none but the weightiest reasons should disturb a settled principle affecting property rights determined after full argument and upon mature deliberation.

Oakley *vs.* Aspiwall, 13 N. Y., 500.

And if *stare decisis* prevents a reconsideration of the rule we have relied upon in the prosecution of this case we suggest it is equally as beneficial as the many arguments we might expect again in answer to the reiterated arguments of counsel on the other side, now pressed for the third time against the enforcement of a wholesome statute.

General Statutes 1878, c. 34, sec. 57.

But we do not assent to the proposition that these former adjudications are unsound in principle, and we have looked further into counsel's brief with expectant curiosity for the conclusive reasons

that should make apparent the errors of this court—if indeed
92 there be no other rule than *stare decisis* to support our cause of action—and are relieved to find only a repetition of the same arguments twice before urged with quite as much force against the judicial construction complained of; under such circumstances the rule of *stare decisis* ought to be sufficient for our protection.

It is claimed that the statute can only be supported as a police regulation. That may well be, and if it can be supported as a police regulation we are content to rest its enforcement upon that ground as well as upon *stare decisis*. We will readily concede "that the prevention of the danger is the limit of the police regulation," and still the physical fact must be apparent that cattle will run upon an unfenced railroad and that the adjoining land-owners' stock will not be prevented from straying upon the track unless the statute is complied with and the fences are built as the law requires. It is because the limit of the police regulation has not been reached and the danger which constitutes such limit has not been prevented that we complained and secured our recovery.

The pet theory of appellant that it might have built a fence somewhere between its track and the adjoining land upon its right of way (to evade the statute, of course) and thus comply with the letter of the law while it violates its spirit in giving no protection to the land-owner is both shallow and dishonest; it is shallow because the injury to the land-owner arises solely from the fact that the prevention of danger, which is the limit of police regulation, has not been accomplished, or if that result has been accomplished, then the land-owner sustains no injury, and it is dishonest
93 because the railroad company who acquired its right of way for a railroad attempts now to disclaim its previous purposes. But it must be remembered that counsel is theorizing only upon the possible results of supposition, for in this case no fence of any kind was ever built, and the inquiry at the trial was upon the difference in fact between the use of the farm lawfully fenced and as it was without any fence whatever. The jury have determined this legitimate issue of fact, and we submit that suppositions are now out of order.

The fatal fallacy of appellant's position is in trying to make suppositions subserve the useful purposes of fence posts and barbed wire; this cannot be done.

Similar laws to the one under consideration are now very common and are not so peculiar as counsel imagines. In the language of this court (Mitchell, J.), "Statutes imposing special duties and liabilities upon railroad companies are to be found on the statute books of almost every State, and if general in their application to all such corporations they are valid."

Herrick *vs.* M. & St. L. R'y Co., 31 Minn., 16; *ibid.*, 127 U. S., 210.

To further illustrate the extent of the police power in giving redress to private individuals who sustain damages for the violation of the old rule—

Sic utere tuo ut alienum non laedas.

94 We would refer the counsel to a few of the numerous decisions in courts of high authority, where he will find that his line of argument is not entirely new nor the former adjudications of this court so original in principle and isolated in character as to be without respectable associates in error.

Thorpe *vs.* R. & B. R'y, 27 Vt., 140.
Slaughter-house Cases, 16 Wall., 36.
Munn *vs.* Illinois, 94 U. S., 113.
Chicago, B. & C. R. Co. *vs.* Iowa, 94 U. S., 155.
Moran *vs.* Goodwin, 130 Mass., 158.
Kreiter *vs.* Nichols, 28 Mich., 496.
Volans *vs.* Owen, 74 N. Y., 526.
McAunich *vs.* M. & M. R'y Co., 20 Ia., 338.
Mackey *vs.* Mo. Pac. R'y Co., 127 U. S., 205.
Dittberner *vs.* C., M. & St. P. R'y Co., 47 Wis., 138.
Herrick *vs.* M. & St. L. R'y, 31 Minn., 11.

II.

The criticisms upon the charge of the court are not tenable. The jury were repeatedly instructed that the measure of damages was the diminution of the rental value, caused by the maintenance and operation of an unfenced railroad through it. This was the correct rule, as conceded by counsel, and the remarks of the court complained of were qualified and controlled by the other portions of the charge in this respect—they were illustrations of the considera-

95 tions that went to make up the rental value—for there was no evidence of any money expended by plaintiff, and no prejudice could result from such illustrations; but we submit it was proper to consider, in connection with all the evidence in the case, the added burdens caused by the nuisance to plaintiff to ascertain what was the diminution in rental value. The whole charge, when taken together, could not have misled the jury in any respect. All the facts which diminish the value of the use of property, caused by wrongful acts of another, are elements of damage and should be shown by evidence and considered by the jury, and, as was said in a similar case, "The court was evidently endeavoring to make the applicable rules of law clear to minds of the jury, and common fairness and common sense require that a charge should be considered as a whole, and if, upon such consideration, it is found to instruct the jury with substantial correctness it ought to stand."

Brakken *vs.* M. & St. L. R'y Co., 31 Minn., 45.

III.

Appellant complains because the actual manner of carrying on the farm was shown, and claims that the damages are to be estimated without such information, and that the question to be determined is a purely abstract one of opinion. It is a very concrete question to the land-owner in such cases, and if, as conceded, the

injured party is entitled to all the damages he has sustained,
96 and the measure of damages is the diminution of rental value for any purpose (reasonable purpose), or whether it is the diminished value of the use for the commonest purposes imaginable, this evidence would show whether or not the farm was useful at all and whether it was so carried on that any damages were sustained or sustainable. This court has said in a similar case, "We conceive the true measure of the plaintiff's damages to be compensation for the injury sustained by him, or, in other words, the difference in the fair rental value of the property," etc.

Brakken *vs.* M. & St. L. R'y Co., 29 Minn., 45.

We do not understand that the phrase "rental value" implies that the land must be actually rented or rentable, but the term is employed to express the value of use as distinguished from the value of the ownership, and we do not think it necessary, either, to waste time on the proposition that the facts upon which expert or opinion evidence is founded are as admissible as the opinions based thereon. Counsel should not forget that we are dealing with a practical rather than an abstract question, and that facts are primarially the subjects of inquiry in litigation. The jury knowing the facts could have formed a judgment without any expert testimony whatever, and they may have done so. Who can tell?

IV.

The instruction complained of in the fourth point of coun-
97 sel's brief was intended to be and was favorable to the defendant. If it was not more favorable to defendant than to plaintiff, it was an abstract proposition, harmless, and clearly not prejudical to defendant. It is to be presumed that plaintiff and all others are ordinarily prudent men and conduct their business in an ordinarily prudent manner. No one questioned this on the trial, and we suppose it cannot be questioned now.

V.

The refusal of the court to strike out "last part of witness' answer" (folio 23) was properly denied, for there was much more in the answer and the last part of it than counsel now considers objectionable. The motion to strike out was indefinite and the refusal in any event discretionary. Every other question criticised under this point was unobjectionable on the grounds stated, and the verdict should not be disturbed on such grounds.

VI.

The weight of evidence was for the jury, and the court properly refused to interfere with their province in this cause on that ground. The testimony clearly established the facts set forth in the complaint regarding the imposition of the unfenced railroad upon plaintiff's farm for six years, and "that a farm through which or along which

a railroad runs is less valuable by reason of the road being
98 without fences than it would be if the road was properly fenced must be apparent to any one."

Emmons *vs.* Appellant, 35 Minn., 505.

Sufficient facts were before the jury without a word of expert testimony to enable them to determine the extent of the injury; their verdict was moderate, less than the estimate of any witness, clearly within bounds, and we submit should not now be disturbed. All of which is respectfully submitted.

LOVELY, MORGAN & MORGAN AND
WALTER J. TRASK,
Attorneys for Respondent.

99 STATE OF MINNESOTA:

April Term, A. D. 1889.

OLE NELSON, Respondent,
vs.
MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Appellant. } Opinion.

This action is similar to that of Emmons *vs.* Railway Co., 35 Minn., 503, 29 N. W. Rep., 202, in which we held that, under Gen. St., 1878, c. 34, p. 57, a railway company is liable for damages to an abutting farm, rendering its use less valuable, caused by a failure to fence its road. Counsel for the defendant asks us to reconsider the question and overrule that case. After a careful consideration of his argument our views remain unchanged.

We do not propose to re-enter upon a discussion of the question further than to say that we think the fallacy of counsel's argument consists in assuming that because the statute requiring railways to fence their roads is a police regulation, the object of which is to prevent animals from getting upon the track and the consequent danger to the animals themselves and to railway passengers and employés, therefore it is in excess of the police power of the State to impose any liabilities for non-compliance with the law other than for resultant injuries to animals and railway passengers and employés. The police legislation of the country abounds in the imposition of penalties and liabilities beyond such resultant injuries as a means of enforcing strict compliance with the statute, and we know
100 of no means more likely to insure prompt obedience to the requirements of this "fence law" than the provisions of section 57 as construed in the Emmons case.

2. The assignments of error in the admission of evidence and in the charge of the court all go to the question of the proper measure of damages in such a case and how these damages may be proven. In Emmons *vs.* Railway Co., 38 Minn., 215, 36 N. W. Rep., 340, it was held that the measure of damages is the injury to the rental value of the farm. The term "rental value" is but another form of saying the "value of the use" and means simply the value of the

use of the land for any purpose for which it is adapted in the hands of a prudent and discreet occupant upon a judicious system of husbandry A man is not bound to rent his farm for a cash rent or to show that he could have done so in order to recover for injuries to its use. What the law aims at is compensation, and the matter of ascertaining the rental value or how much it has been depreciated is a practical question, to be treated in a practical way, and to the consideration of which it is necessary to bring a little of the farmer as well as the lawyer. It can be stated generally that evidence of any fact which would have tended to show how and to what extent the absence of a railroad fence injuriously affected the value of the use of the farm would have been competent. The case was rather loosely tried, and some parts of the charge of the court, when taken by themselves, seem unguardedly expressed, but as to whether, in the admission of evidence as to the depreciation of rental value, the trial court exceeded the limits of the rule above suggested
101 and as to whether, taking the charge as a whole and as applied to the evidence, it contained any prejudicial error in laying down the measure of damages the judges who heard the argument are equally divided. Therefore the judgment appealed from must be affirmed.

MITCHELL, *J.*

Collins, J., absent, took no part.

102 State of Minnesota Supreme Court, General April Term, A. D. 1889.

FRIDAY MORNING, 9.30 O'CLOCK, *May* 31, *A. D.* 1891.

Court convened pursuant to adjournment, all the justices being present.

OLE NELSON, Respondent,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Appellant. } No. 5688, 69.

This cause came on to be heard this day upon the return to the — herein.

Thereupon the same was argued by counsel, submitted to the court for decision, and taken under advisement.

A true record.

Attest: J. D. JONES, *Clerk.*

The foregoing is a full and true copy of the minutes of argument in the above-entitled cause.

Attest: J. D. JONES, *Clerk.*

103 [Endorsed:] State of Minnesota supreme court. Copy of minutes of argument. Filed ——, A. D. 188-. ——, clerk.

104 State of Minnesota Supreme Court, April Term, A. D. 1889.

OLE NELSON, Respondent,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Appellant. } No. 69.

Appeal from district court, tenth judicial district, county of Freeborn.

This cause having been duly argued and submitted at the general April term of this court, A. D. 1889, upon the return to the appeal herein—

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the court below herein appealed from be, and the same hereby is, in all things affirmed, and that the respondent above named have judgment accordingly.

Entered July 19th, A. D. 1889.

By the court:

Attest: J. D. JONES, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above-entitled cause.

Attest: J. D. JONES, *Clerk.*

105 [Endorsed:] No. —. State of Minnesota supreme court. Copy of order for judgment. Filed —— —, A. D. 188–. —— ——, clerk. Entered on page —.

106 State of Minnesota Supreme Court, April Term, A. D. 1889.

OLE NELSON, Respondent,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Appellant. } No. 69.

Pursuant to an order of court duly made and entered in this cause on the 19th day of July, A. D. 1889—

It is here and hereby determined and adjudged that the judgment of the court below herein appealed from, to wit, of the district court of the tenth judicial district, sitting within and for the county of Freeborn, be, and the same hereby is, in all things affirmed.

And it is further determined and adjudged that the respondent above named do have and recover of said The Minneapolis & St. Louis Railway Company, appellant herein, the sum and amount of forty-six and $\frac{50}{100}$ dollars ($46.50), costs, and disbursements in this cause in this court, and that said respondent have execution for the enforcement thereof.

Dated and signed this 19th day of July, 1889.

By the court:

Attest: J. D. JONES, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$25 00
Clerk's fees for making return	
Printer's fees for printing briefs	10 50
Clerk's fees supreme court	10 00
Execution and return	
Filing mandate and docketing transcript	
Affidavits and acknowledgments	1 00
Postage	
Copying return for printer	
	$46 50

107 [Endorsed:] Nelson. State of Minnesota supreme court. Transcript of judgment. Filed —— —, A. D. 188–. —— ——, clerk. —— ——, attorney for —. Page No. —, —— Book.

STATE OF MINNESOTA, *Supreme Court,* } ss:

I, J. D. Jones, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this 19th day of July, A. D. 1889.

J. D. JONES, *Clerk.*

108 To the Honorable James Gilfillan, chief justice of the supreme court of Minnesota:

Now comes the Minneapolis and St. Louis Railway Company, by James D. Springer, its attorney, and complains that in the records and proceedings and also in the rendition of a judgment in a suit between Ole Nelson, plaintiff, and the said Minneapolis and St. Louis Railway Company, defendant, in the supreme court of Minnesota, being the highest court of law or equity of the State of Minnesota in which a decision could be had in said suit, and in which a final judgment was rendered against it on the 19th day of July, A. D. 1889, in said suit, wherein it was adjudged that so much of chapter 24, General Laws of Minnesota for 1876, and of chapter 73, General Laws of Minnesota for 1877, as was held to impose responsibility upon the said railway company for damages for the diminution in the rental value of the farm of said Ole Nelson, occasioned by the failure of plaintiff in error to fence its railway, did not impair the obligations of the charter of said railway company, contrary to the clause of section ten (10), article one (1), of the Constitution of the United States, which prohibits any State from passing any law impairing the obligation of contracts; also that it did not deprive said railway company of its property without due process of law, con-

trary to the 14th amendment to the Constitution of the United States, nor deny to the said railway company the equal protection of the laws, contrary to the said 14th amendment. It was also adjudged by said supreme court, by its said final judgment in said suit, that so much of said chapter 24 and 73 as was held to impose
109 upon the said railway company the duty of building or maintaining at its own sole cost and expense the fence of its railway was not in contravention of the said provisions of the Constitution of the United States, all of which appears in the records and proceedings of said suit, whereby manifest error has happened, to the great damage of the said railway company.

Wherefore the said railway company prays for the allowance of a writ of error and for such other process as may cause the same to be corrected by the Supreme Court of the United States.

J. D. SPRINGER,
Attorney for Minneapolis and St. Louis Railway Company,
Minneapolis, Minn.

Allowed.
JAMES GILFILLAN,
Chief Justice Supreme Court Minnesota.

110 [Endorsed:] 5688. M. & St. L. R'y Co. *vs.* Nelson. Petition for writ of error and order allowing same. Filed August 5, 1889. J. D. Jones, clerk.

111 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Minnesota, Greeting:

Because that in the records and proceedings and also in the rendition of the judgment of a plea which is in the supreme court of Minnesota, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Ole Nelson and The Minneapolis and St. Louis Railway Company, wherein was drawn in question the validity of a statute of the said State on the ground of its being repugnant to the Constitution of the United States and the decision was in favor of such validity, a manifest error had happened, to the great damage of the Minneapolis and St. Louis Railway Company, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with the writ, so that you may have the same at Washington on the 2nd Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

112 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States.

[Seal U. S. Circuit Court, Dist. of Minnesota.]

OSCAR B. HILLIS,
Clerk of the Circuit Court of the United States for the District of Minnesota.

113 [Endorsed:] 5688. M. & St. L. R'y Co. *vs.* Nelson. Writ of error. Filed Aug. 5, 1889. J. D. Jones, clerk.

114 UNITED STATES OF AMERICA, *ss:*

To Ole Nelson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Minnesota, wherein The Minneapolis and St. Louis R'y Co. is plaintiff in error and you are defendant in error, to show cause, if any there by, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable James B. Gilfillan, chief justice of the supreme court, district of Minnesota, this second day of August, A. D. 1889.

JAMES GILFILLAN,
Chief Justice.

115 [Endorsed:] 5688. M. & St. L. R'y Co. *vs.* Nelson. Citation. Due service of this citation and the writ of error therein mentioned admitted this 5th day of August, A. D. 1889, at St. Paul, Minn. John A. Lovely, att'y for defendant in error. Filed Aug. 5, 1889. J. D. Jones, clerk.

116 Supreme Court of the United States.

MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY, Plaintiff in Error,
vs.
OLE NELSON, Defendant in Error.

Assignment of Errors.

First. The court erred in holding the plaintiff in error responsible in damages for the diminution in rental value of the abutting farm of defendant in error occasioned by the failure of plaintiff in error to fence its railway.

Second. The court erred in holding that so much of chapter 24, General Laws of Minnesota for 1876, and chapter 73, General Laws of Minnesota for 1877, as is held to impose responsibility upon plaintiff in error for damages for the diminution in the rental value

of the farm of defendant in error occasioned by the failure of plaintiff in error to build or maintain the fence in question did not impair the obligations of the charter of the plaintiff in error, contrary to the clause of section 10, article one (I), of the Constitution of the United States, which prohibits any State from passing any law impairing the obligation of contracts.

Third. The court erred in holding that so much of chapter 24 of the General Laws of Minnesota for 1876 and chapter 73, General Laws of Minnesota for 1877, as is held to impose responsibility upon plaintiff in error for damages for the diminution in rental
117 value of the abutting farm of defendant in *in* error occasioned by the failure of plaintiff in error to build and maintain the fence in question did not deprive the plaintiff in error of its property without due process of law, contrary to the 14th amendment to the Constitution of the United States.

Fourth. The court erred in holding that so much of chapter 24, General Laws of Minnesota for 1876, and chapter 73, General Laws of Minnesota for 1877, as is held to impose responsibility upon plaintiff in error for damages for the diminution in the rental value of the abutting farm of defendant in error occasioned by the failure of plaintiff in error to build or maintain the fence in question did not deny to the plaintiff in error the equal protection of the laws, contrary to the 14th amendment to the Constitution of the United States.

Fifth. The court erred in holding that so much of chapter 24, General Laws of Minnesota for 1876, and chapter 73, General Laws of Minnesota for 1877, as is held to impose upon plaintiff in error the duty of building or maintaining at its own sole cost and expense the fence in question did not impair the obligations of its charter, contrary to that clause of section 10, article one (I), of the Constitution of the United States which forbids any State from passing any law impairing the obligation of contracts.

Sixth. The court erred in holding that so much of chapter 24, General Laws of Minnesota, 1876, and chapter 73, General Laws of Minnesota for 1877, as is held to impose upon plaintiff in
118 error the duty of building or maintaining at its own sole cost and expense the fence in question did not deprive plaintiff in error of its property without due process of law, contrary to the 14th amendment to the Constitution of the United States.

Seventh. The court erred in holding that so much of chapter 24, General Laws of Minnesota for 1876, and chapter 73, General Laws of Minnesota for 1877, as is held to impose upon plaintiff in error the duty of building or maintaining at its own sole cost and expense the fence in question did not deny to the plaintiff in error the equal protection of the laws, contrary to the 14th amendment to the Constitution of the United States.

Eighth. The court erred in overruling the objections of the plaintiff in error to the following questions propounded by his counsel to the defendant in error:

"At the time the railway company built its road across your farm

the way it did how did its neglect to build that fence and cattle-guard interfere with your free use and occupation of that farm?"

Ninth. The court erred in denying the motion of plaintiff in error to exclude the following evidence given on the part of the defendant in error:

"I herded my cattle so that they would not get into the neighbors' field." "They would get into the neighbors' field by reason of the negligence of the railway company by not building cattle-guards and fences along the track."

119 Tenth. The court erred in overruling the objections of the plaintiff in error to the following questions propounded to the defendant in error when testifying on his own behalf at the time of the trial:

"I will ask you this question—if you know what the difference is you may answer by yes or no—if you know what the difference between the rental value of that farm was between the first day of November, 1879, and the 19th day of October, 1885, by reason of the neglect of the defendant railway company to build fences on each side of its track and cattle-guards at the road crossings where it entered and left your farm. I will ask you what was the difference in the value per year caused by neglect of the railway company to put cattle-guards in between those times;" also to similar questions propounded to the witnesses Louis Marpe, P. Honan, and James Maguire.

Eleventh. The court erred in admitting over the objections of plaintiff in error all the evidence given tending to show the diminution in rental value of the farm of defendant in error alleged to have been occasioned by the omission of plaintiff in error to fence its railway and in overruling the motion of plaintiff in error to exclude the same.

Twelfth. The court erred in affirming the correctness of the decision of the trial court in overruling the objections of the plaintiff in error when testifying on his own behalf at the time of the trial.

"I will ask you this question—if you know what the difference is you may answer by yes or no—if you know what the dif-

120 ference between the rental value of that farm was between the first day of November, 1879, and the 19th day of October, 1885, by reason of the negligence of the defendant railway company to build fences on each side of its track and cattle-guards at the road crossings where it entered and left your farm. I will ask you what was the difference in the value per year caused by neglect of the railway company to put cattle-guards in between those times;" also to similar questions propounded to the witnesses Louis Marpe, P. Honan, and James Maguire.

Thirteenth. The court erred in affirming the correctness of the determination of the trial court in overruling the objections of the plaintiff in error to the following questions propounded by his counsel to the defendant in error: "At the time the railway company built its road across your farm the way it did how did its neglect to build that fence and cattle-guard interfere with your free use and occupation of that farm?"

Fourteenth. The court erred in affirming the action of the trial court in denying the motion of plaintiff in error to exclude the following evidence given on the part of the defendant in error:

"I herded my cattle so that they would not get into the neighbors' field." "They would get into the neighbors' field by reason of the negligence of the railway company by not building cattle-guards and fences along the track."

121 Fifteenth. The court erred in affirming the correctness of the judgment of the trial court in overruling the objections of the plaintiff in error to the following questions propounded to the defendant in error when testifying on his own behalf at the time of the trial:

"I will ask you this question—if you know what the difference is you may answer by yes or no—if you know what the difference between the rental value of that farm was between the first day of November, 1879, and the 19th day of October, 1885, by reason of the neglect of the defendant railway company to build fences on each side of its track and cattle-guards at the road crossings where it started and left your farm. I will ask you what was the difference in the value per year caused by neglect of the railway company to put cattle-guards in between those times;" also to similar questions propounded to the witnesses Louis Marpe, P. Honan, and James Maguire.

Sixteenth. The court erred in affirming correctness of the decision of the trial court in admitting evidence over the objections of plaintiff in error tending to show the diminution in the rental value of the farm of defendant in error occasioned by the failure of plaintiff in error to fence its railway and in overruling the motion of plaintiff in error to exclude the same.

Seventeenth. The court erred in affirming the correctness of the following portions of the charge of the trial court to the jury:

"But he is to be compensated for what he has suffered in
122 the loss of the use of the premises by the neglect and omission by the defendant to fence its track through his land with a suitable fence and for not putting in suitable and proper cattle-guards at the crossings of the highways. Whatever amount the neglect of the defendant to build its fence or to build these cattle-guards has impaired or diminished the value of the use of this farm of the plaintiff during these six years he is entitled to recover.

Eighteenth. The court erred in affirming the judgment of the trial court.

123 [Endorsed:] 5688. M. & St. L. R'y Co., plaintiff in error, *vs.* Oleson Nelson, def't in error. Filed Aug. 5, 1889. J. D. Jones, clerk. Due service of the within pleading by copy is hereby admitted at ——, Minnesota, this — day of ——, A. D. 188-. —— ——, attorney for —. James D. Springer, Minneapolis, Minn., attorney for defendant.

124 Supreme Court of the United States, *ss:*

OLE NELSON, Plaintiff,
vs.
THE MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY, Defendant.

Know all men by these presents that we, the Minneapolis and St. Louis Railway Company, as principal, and William H. Truesdale and James D. Springer, are held and firmly bound unto *[Ole Nelson] Henry G. Emmons, of Freeborn county, in the State of Minnesota, in the sum of two thousand ($2,000) dollars, to be paid to the said *[Ole Nelson] Henry G. Emmons, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 2nd day of August, A. D. 1889.

Whereas the above-named Minneapolis and St. Louis Railway Company hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Minnesota:

Now, therefore, the condition of this obligation is such that if the above-named Minneapolis and St. Louis Railway Company shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

125 THE MINNEAPOLIS & ST. LOUIS R'Y CO.,
By W. H. TRUESDALE, *Pres't.*
[SEAL.] JOS. GASKELL, *Secretary.*
WM. H. TRUESDALE.
JAMES D. SPRINGER.

Signed, sealed, and delivered in presence of—

——— ———.

STATE OF MINNESOTA, *County of Hennepin,* } *ss:*

William H. Truesdale and James D. Springer, being duly sworn, depose and say and each for himself saith that he is worth the sum of four thousand ($4,000) dollars over and above all his just debts and liabilities in unencumbered property in the State of Minnesota subject to execution.

WM. H. TRUESDALE.
JAMES D. SPRINGER.

*Words in brackets erased in copy.

Subscribed and sworn to before me this 2nd day of August, A. D. 1889.

[SEAL.] CHARLES H. SMITH,
Notary Public, Hennepin County, Minnesota.

I approve the foregoing bond and sureties this 5th day of August, 1889.

JAMES GILFILLAN,
Chief Justice Supreme Court, Minnesota.

126 [Endorsed:] 5688. Copy. M. & St. L. R'y Co. *vs.* Nelson. Bond. Filed Aug. 5, 1889. J. D. Jones, clerk.

127 *Schedule of Papers Included in the Return Hereunto Following.*

(1.) Complaint, answer, and reply.
(2.) Verdict of the jury.
(3.) Settled case or bill of exceptions.
(4.) Motion for new trial.
(5.) Order denying motion for new trial.
(6.) Judgment.
(7.) Notice of appeal and appeal bond.
(8.) Points and authorities on the part of each party.
(9.) Judgment of affirmance.
(10.) Opinion of the court.
(11.) Original petition for writ of error and order allowing the same.
(12.) Original writ of error and proof of service of same.
(13.) Original citation and proof of service of same.
(14.) Assignment of errors.
(—.) Copy of bond.

128 STATE OF MINNESOTA, } *ss:*
Supreme Court, }

I, J. D. Jones, clerk of the supreme court of the State of Minnesota, do hereby certify and return, in obedience to the writ of error hereunto annexed, that the above and foregoing is a full, true, complete, and accurate copy of the record, except filings on papers, &c., in the case of Ole Nelson, plaintiff, *versus* The Minneapolis & St. Louis Railway Company, defendant, as full, true, complete, and accurate as the same remains of record and on file in my office, together with the original petition for writ of error and order allowing the same, the original writ of error and proof of service of same, the original citation and proof of service thereof, and the assignment of errors, except as noted or shown in said transcript & as appears from annexed schedule.

In testimony whereof I have hereunto signed my name officially and affixed the seal of the said supreme court of Minnesota the 30th day of September, A. D. 1889.

[Seal of the Supreme Court, State of Minnesota.]

J. D. JONES,
Clerk of Supreme Court, Minnesota.

Endorsed on cover: Case No. 13,851. Minnesota supreme court. No. 241. The Minneapolis & St. Louis Railway Company, plaintiff in error, *vs.* Ole Nelson. Filed October 21, 1889.